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In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-1814

JAMES FRANCIS MELVIN,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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UNITED STATES OF AMERICA,
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Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

James Francis Melvin petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on April 13, 1979, and May 4, 1979.

Opinions Below.

The Court of Appeals for the First Circuit issued an opinion, Bownes, J., dissenting, not yet reported, on April 13, 1979.

The opinion is reproduced in the Appendix at pp. 24a-54a. The memorandum and order entered May 4, 1979, denying Melvin's petition for rehearing, is reproduced in the Appendix at pp. 56a-57a. Petitioner's motion to suppress was denied after numerous hearings before both the United States Magistrate and the United States District Court for the District of Massachusetts. The Magistrate's recommendations and reports on petitioner's motion to suppress of May 3, 1977, and November 18, 1977, are reproduced in the Appendix at pp. 1a-5a, 10a-21a. The District Court's memoranda and orders of November 15, 1977, July 27, 1978, and August 3, 1978, denying petitioner's motion to suppress are reproduced in the Appendix at pp. 6a-9a, 21a-23a.

Jurisdiction.

The original judgment of the Court of Appeals was entered on April 13, 1979 (App. 55a). A timely petition for rehearing was denied on May 4, 1979 (App. 56a-57a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

I. Whether the constitutionally mandated standard of probable cause to justify the issuance of a warrant to search a private residence for evidence and instrumentalities of crime requires a higher degree of certitude than a mere reasonable basis to believe that such items will be found in that home?

II. Whether the constitutionally mandated credibility/reliability requirements — which must be met to justify judicial

reliance on information in an affidavit in support of a search warrant provided to an affiant by a third party — have been abrogated where information essential to any possible finding of probable cause has been provided by an individual identified only as an "unknown male"?

Constitutional Provision Involved.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Statement of the Case.

At approximately 4 A.M. on November 18, 1976, there was an explosion at Rooney's Tavern in the Dorchester section of Boston, Massachusetts (App. 25a). At 5:30 P.M. on November 19, 1976 — more than 37½ hours after the explosion (App. 53a) — a judge of the Suffolk Superior Court for the Commonwealth of Massachusetts issued a warrant to search petitioner's home in Weymouth, Massachusetts, for evidence and instrumentalities of that explosion.

The warrant was predicated on an affidavit submitted by Boston Police Detective John Lydstone after discussion with

the District Attorney. Reproduced in the dissenting opinion below (App. 40a-54a; see n.2 at App. 41a-43a), the affidavit states that there was an explosion at Rooney's Tavern, probably caused by using wires to detonate a blasting cap which in turn detonated a stick of dynamite; that while on duty and patrolling in the area of Rooney's Tavern at about 2 A.M., John Arnstein, a Boston Police officer, had seen a white Cadillac parked in front of the tavern and had seen a white male standing at the front door;[1] that Arnstein later indicated that a photograph of petitioner James Melvin bore a "strong resemblance" to the man seen at the tavern door at 2 A.M.; that when Arnstein responded to the radio call concerning the explosion at Rooney's Tavern at approximately 4 A.M. an "unknown male" stated to him that a white Cadillac had left the scene moments before the explosion; that James Melvin is listed as an owner of Rooney's Tavern and operated a white 1976 Cadillac; and, finally, that bomb squad officers believed that the type of explosive used would generally be assembled in a workshop of some sort.

The search warrant was executed on the evening of November 19, 1976, by state and federal law enforcement officers. No evidence related to the explosion was seized. However, during the course of the search, the firearms which form the basis of the conviction in this case were seized from the basement of petitioner's home.

Petitioner challenged the validity of the search warrant in the District Court, contending that the affidavit was facially insufficient to establish probable cause to believe that evidence or instrumentalities of the explosion would be found in his home; that critical information provided by an individual identified only as an "unknown male" was improperly relied

[1] Arnstein later testified that he had not observed the model, year, or license number of the Cadillac, and that he had not stopped to investigate because he did not feel the circumstances were suspicious.

upon in determining the existence of probable cause; and that the affidavit contained misrepresentations and omissions of fact rendering it insufficient to establish probable cause.[2]

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[2] The testimony at the hearings on the motion to suppress fleshed out the skeletal facts concerning the "unknown male" and his observations and the subsequent police investigation. According to Arnstein, a few minutes after his arrival at Rooney's Tavern an individual tapped him on the shoulder and asked: "Am I a prime suspect on this?" Arnstein looked around and recognized him as an individual he knew by the nickname of "Arky." "Arky" is the nickname of Arthur Sutliff, the owner of the Circle Cafe, a bar located across the street from and a business competitor of Rooney's Tavern. According to Arnstein, Arky told him that he was there to turn off an alarm on his property and that he had seen a white Cadillac leave the area. He did not say what time the vehicle had left or whether it had left before or after the explosion. In a court-ordered videotaped deposition, Sutliff testified that there had been no conversation concerning an alarm and that he had not told Arnstein that he had seen a white Cadillac. Arnstein knew that Arky's "property" was the Circle Cafe and had seen him there prior to November 18, 1976, when he had responded to disturbances at that establishment. Arnstein had also seen Arky before November 18, 1976, at a Dunkin Donuts Shop. Arnstein knew that Arky had some managerial responsibilities at the cafe. However, he made no efforts to find out Arky's full name, or his background.

Boston Police Officer John Lydstone of the Intelligence Division began investigating the explosion at Rooney's Tavern at approximately 9:30 in the morning of November 18, 1976. Early that evening he interviewed Patrolman Arnstein, and was informed of Arnstein's own observations at 2 A.M. and his conversation with Arky. As recalled by Lydstone, Arnstein said that Arky had said: "Am I a suspect in this?", and told him that he had been by just after or just before the explosion and had seen a white Cadillac leaving the area. Lydstone, too, was familiar with the individual nicknamed Arky and the fact that he was connected with the Circle Cafe.

Lydstone and his partner, Martin Coleman, then went to the Circle Cafe and inquired for Arky. Although he was not there, Coleman spoke to him on the telephone and related the conversation to Lydstone. Arky told Coleman that he had seen a white car parked in the rear of the tavern and, when asked if he had told Arnstein earlier that he had seen a white Cadillac, said no, that he had only been joking, and could not identify the make of the car. Arky also told Coleman that threats had been received at the bar, but not by him personally. There was no evidence that any threats had been made by or at the request of petitioner.

Although he was speaking to Arky on the telephone, Coleman did not ask him for his full name. Nor did he or Lydstone ask the waitress in the Circle

The trial court held that the information provided by the "unknown male" could properly be relied upon under the relaxed credibility/reliability standards applicable to so-called citizen informants; that the affidavit was facially sufficient to establish probable cause to believe that the explosive device had been constructed in petitioner's home and that instrumentalities would be found there; and that there were no deliberately false statements, statements made with reckless disregard for the truth, or omissions consciously made to falsify the affidavit.

Petitioner was convicted of possession of firearms not registered to him in the National Firearms Registration and Transfer Record in violation of 26 U.S.C. § 5861(d) following a jury-waived trial upon stipulated facts.

In a two-to-one decision the Court of Appeals also rejected petitioner's Fourth Amendment claims. Treating the "unknown male" as a "bystander witness," the majority held the *Aguilar-Spinelli*[3] standards inapplicable and found that Officer Arnstein's 2 A.M. observation of a white Cadillac at the tavern provided sufficient corroboration to afford the requisite substantial basis for crediting the hearsay (App. 30a-32a).

Conceding that the question of probable cause to search petitioner's home was a close one (App. 33a; see also App. 56a), the majority rejected a more likely than not, or preponderance of the evidence, standard of probable cause, and, utilizing a standard of probable cause consisting of a "reasonable basis to believe" — a standard which petitioner submits is constitutionally defective — found probable cause to search petitioner's home on the basis of facts sufficient to

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Cafe, or any other employee there, for Arky's full name. Lydstone later checked the liquor license, but was unable to identify Arky from the documents.

[3] *Aguilar* v. *Texas*, 378 U.S. 108 (1964); *Spinelli* v. *United States*, 393 U.S. 410 (1969).

regard petitioner as a prime suspect, coupled with the bomb squad's belief that the explosive device was of a type that generally would be assembled in a workshop of some sort, and a rejection of the tavern as a likely place for construction of the device. The majority also held that the District Court had not erred in finding that the affidavit contained no material misstatements or omissions made with the intent to falsify or with reckless disregard for the truth (App. 35a-37a).

Reasons Why the Writ Should be Granted.

I. In Redefining Probable Cause as Simply a "Reasonable Basis to Believe," the Court Below Promulgated and Applied a Novel and Unprecedented Standard of Cause for Judging the Validity of Warrants Lower than the Probable Cause Expressly Mandated by the Warrant Clause of the Fourth Amendment, in Abrogation of Constitutionally Guaranteed Rights and Liberties.

In affirming the judgment of conviction, the majority promulgated and applied a "reasonable basis" standard for determining the validity of the warrant to search petitioner's home. Petitioner submits that in so doing the majority adopted a new and unprecedented standard of cause for judging the validity of warrants — a standard lower than the probable cause expressly mandated by the warrant clause of the Fourth Amendment and one which abrogates the well-established requirement of specific and articulable facts undergirding this Court's Fourth Amendment jurisprudence. Petitioner submits that the standard, and its application to the facts of this case, is flawed both legally and logically and, because this new standard flies in the face of one of the oldest cornerstones of Fourth

Amendment jurisprudence and substantially decreases the protections provided by the Fourth Amendment, this Court should grant certiorari.

When the language and structure of the Fourth Amendment are examined and when viewed in historical context, there can be no question that the framers intended[4] that the probable cause necessary for the issuance of a warrant require a higher degree of certitude than the reasonable basis to believe adopted by the majority in this case.

Although reasonableness may be the "overriding test of compliance with the Fourth Amendment" (App. 28a), it cannot displace the requirement of probable cause as the touchstone for determining the constitutional validity of a warrant. What is reasonable under the Fourth Amendment for purposes of assessing the constitutionality of certain types of searches is not reasonable for all. A variety of searches deemed reasonable under the Fourth Amendment — border searches, inventories, certain administrative searches, stops and frisks — may all be conducted on less than probable cause. (See, e.g., *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973); *South Dakota* v. *Opperman*, 428 U.S. 364 (1976); *United States* v. *Biswell*, 406 U.S. 310 (1972); *Terry* v. *Ohio*, 392 U.S. 1 (1968)). However, full scale criminal investigative searches made pursuant to a warrant stand apart. They, unlike the searches set forth above, have had a specific and higher standard of certitude — a standard of probable cause — constitutionally imposed upon them as a predicate for compliance with the Fourth Amendment.[5]

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[4]The relevance of historical context and the framers' intent in construing the Fourth Amendment have often been recognized by this Court. See, e.g., *United States* v. *Chadwick*, 433 U.S. 1 (1977).

[5]Indeed, in *United States* v. *Ramsey*, 431 U.S. 606, 612-613 (1977), this Court specifically recognized the more stringent nature of the probable cause requirement, stating that "[t]he 'reasonable cause to suspect' test adopted by

The Fourth Amendment provides not only that "[t]he right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated," but, more specifically, that "no Warrants shall issue, but upon probable cause . . .." Accordingly, the warrant requirement is linked textually to the concept of *probable cause* (see, e.g., *South Dakota* v. *Opperman*, 428 U.S. 364, 370 n.5 (1976)) and not simply to the more general prohibition of *unreasonable* searches and seizures. This linkage demonstrates the founding fathers' specific concern with the degree of certitude and specificity required for the issuance of a warrant — a degree of certitude which is, petitioner submits, a more demanding and specific showing than a court's *ad hoc* assessment of a reasonable basis. Indeed, to equate probable cause with a reasonable basis would render the inclusion of the term "probable cause" meaningless. Had the founding fathers intended for a warrant to issue solely on a showing of reasonableness, they could have said so; the specific mandate of probable cause would have been unnecessary. Thus the use of the two separate terms in the Fourth Amendment negates the validity of the equation adopted by the majority.

That probable cause requires a higher degree of certitude than a reasonable basis is further supported by examining the meaning of the words "probable" and "reasonable" extant at the time of the passage of the Fourth Amendment. The *New and Complete Dictionary of the English Language* by John Ash, published in 1775, defines "probable" as "likely, having a preponderance of evidence." "Preponderance" is defined as "the act of outweighing; that which outweighs." "Reasonabic" — the adjective from reason — is defined as "having the

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the statute [19 U.S.C. § 482], is, we think, a practical test which imposes a less stringent requirement than that of 'probable cause' imposed by the Fourth Amendment as a requirement for the issuance of warrants."

faculty of reason; just; rational; moderate; tolerable"; and "reason" is defined as "the power by which we deduce one proposition from another; clearness of faculties." The *Dictionary of the English Language* by Samuel Johnson, Seventh Edition, published in 1783, defines "probable" as "likely; having more evidence than the contrary." "Reasonable" is defined as "acting, speaking or thinking rationally; not immoderate; tolerable." See also, *A New Dictionary of the English Language* by William Kenrick, published in 1773, which sets forth the same definitions of "probable" and "reasonable."

Clearly, the two words are not interchangeable in meaning — having more evidence than to the contrary or having a preponderance of evidence requires a higher degree of certitude than simply being rational, tolerable, or not immoderate. Thus, both the structure of the Fourth Amendment and the meaning of the words as defined during the time period of the adoption of the Amendment demonstrate that compliance with the mandate of probable cause requires a higher degree of certitude than mere *ad hoc* reasonableness — a degree of probability[6] absent from the mere determination of a reasonable basis adopted by the majority below as the standard of probable cause.

Examination of the facts set forth in the affidavit demonstrates the absence of specific, articulable facts — the total lack of specificity — essential to justify the severe intrusion of a full-scale criminal investigative search of a private residence

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[6]Although petitioner does not suggest that a precise mathematical equation must be imposed in defining probable cause, he does suggest that if a mathematical equivalent is to be imposed it must be a more likely than not standard. Anything less would leave persons and their premises subject to governmental intrusion on nothing more than suspicion, and even strong suspicion is not equivalent to probable cause. See, e.g., *Henry* v. *United States*, 361 U.S. 98 (1959).

under traditional, constitutionally mandated standards of probable cause. Indeed, petitioner submits that even under the unprecedented — and constitutionally defective — lowered standard adopted by the majority below the affidavit fails to pass muster. Assuming, *arguendo*, that the magistrate properly relied upon the statement of the "unknown male" (but see section II, *infra*) and, therefore, had an adequate foundation to regard petitioner as a prime suspect in the explosion, the affidavit remains devoid of any factual nexus between the explosion at Rooney's Tavern and petitioner's home. In lieu of specific and articulable facts the majority substituted reliance on inferences and conclusions — drawn from the bomb squad officers' *belief* that the type of explosive device used "would *generally* be assembled in *a workshop of some sort*" (App. 43a n.2 (emphasis added)), and its conclusion that the tavern would have been an unlikely place to have constructed the device — to support a "reasonable basis to believe" that evidence and instrumentalities of the explosion would be found in petitioner's home.

Petitioner maintains first that the majority's exclusion of the tavern as an equally likely place for the construction of the explosive device is predicated on a misapprehension of the scope of governmental authority to inspect the premises of establishments serving liquor. That an establishment may be inspected without notice during business hours (*Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970)) simply does not support a finding that the tavern would be a "particularly unlikely" place to have constructed the explosive device. There is nothing in the record even to suggest that construction of the device would have taken more than two hours. It is therefore, at minimum, equally probable that it was constructed at the tavern between the hours of 2 A.M. and 4 A.M. — hours when the threat of unannounced administrative inspection is nonex-

istent — as it is to believe that it was constructed at petitioner's home and transported to the tavern.

Moreover, even if, contrary to all reasonable inferences, the tavern could be excluded as a likely place of construction, that, under the bomb squad's hypothesis, leaves much of the indoor world as a potential site. The critical element — specific articulable facts to narrow that world to petitioner's home — is totally absent here. The affidavit contains nothing to suggest that petitioner had recently purchased or been seen with any of the items sought, much less that he had brought them into his house prior to the explosion. There were no observations of any such items in his home, at any time. Indeed, there were no facts before the magistrate to support an inference that petitioner had a workshop in his home. Without a nexus between his home and the items sought, there can be no probable cause (see, e.g., *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978)), even if there is reason to suspect his involvement in criminal activity. See, e.g., *United States* v. *Flanagan*, 423 F. 2d 745 (5th Cir. 1970); *United States* v. *Gramlich*, 551 F. 2d 1359 (5th Cir. 1977), cert. denied, 434 U.S. 866 (1977); *United States* v. *Colon*, 559 F. 2d 1380 (5th Cir. 1977); *United States* v. *Solario*, 577 F. 2d 554 (9th Cir. 1978); *United States* v. *Whitlow*, 339 F. 2d 975 (7th Cir. 1964).

The central nature of the requirement of a nexus between the place to be searched and the items to be seized and the necessity of articulable specific facts to support such a nexus is compellingly illustrated by the recent case of *United States* v. *James Lee Taylor*, No. 78-1724 (8th Cir. April 18, 1979). There a warrant for a private residence was predicated on an affidavit stating, in part, that on two separate occasions an agent of the Bureau of Alcohol, Tobacco, and Firearms had driven one Worley (from whom he had recently purchased firearms) to a specific address. Worley had been observed walking toward the house and up to the house. He had never

been observed entering the house. Both times Worley and another individual — identified the second time as defendant Taylor — entered a vehicle parked in the driveway, and drove to a rendezvous point where Worley sold firearms to the A.T.F. agent. At the first sale, Worley stated that the driver of the vehicle was his supplier. After the second sale, Taylor was followed back to the house. The court held that, although "long and detailed," "the affidavit bears a fatal flaw" (Slip. Op. p. 5). In the absence of observations of anyone actually entering or leaving the residence, the allegation of probable cause to believe that the firearms were located in the house rested "on a conclusion or mere suspicion and this the constitution forbids" (Slip. Op. p. 7). Similarly, here, on the skeletal facts presented, the Constitution forbids a finding of probable cause. As stated by the dissent, the issuance of a warrant "eviscerates the fourth amendment's mandate that no warrant issue except on probable cause" (App. 45a), and constitutes "an open invitation to issue warrants upon the gossamers of suspicion and conjecture" (App. 54a).

No decision of this Court supports the majority's unprecedented substitution of a "reasonable basis to believe" for the higher degree of certitude based on specific and articulable facts mandated by the probable cause requirement of the warrant clause of the Fourth Amendment. Accordingly, this Court should grant certiorari to review this abrogation of one of the cornerstones of Fourth Amendment jurisprudence.

II. Reliance on Information Provided by an Individual Identified Only as an "Unknown Male" — Information Crucial to a Finding of Probable Cause — Presents Unresolved Questions Important to the Proper and Uniform Administration of Criminal Justice Concerning the Credibility and Reliability Standards to be Applied to Hearsay Information in Affidavits in Support of Search Warrants.

Petitioner also seeks review of the ruling below that the information provided by the "unknown male" — information which the majority found to be crucial to any reason to suspect petitioner's involvement in criminal activity (App. 30a) — was properly relied upon by the Magistrate as an essential element of a finding of probable cause.

Recognizing the dangers of reliance on hearsay information as justification for the issuance of a warrant to invade an individual's premises and privacy, this Court has established stringent standards of credibility and reliability for determining whether information provided by a confidential informant can be relied upon by a Magistrate to justify a finding of probable cause. *Aguilar* v. *Texas*, 378 U.S. 108 (1964); *Spinelli* v. *United States*, 393 U.S. 410 (1969).

Although a number of Courts of Appeals have addressed some of the problems raised by reliance on information provided by someone other than a traditional confidential informant, and have concluded that factors other than those enunciated in *Aguilar*, *Spinelli* and their progeny may provide the indicia of reliability and credibility necessary to justify reliance on information provided by a citizen-informer or a bystander witness, the questions raised in connection with reliance on a bystander witness have never been fully addressed by this Court. The reliance on the statement of the "unknown male" as a key element in the establishment of probable cause

in this case squarely presents a number of questions concerning the standards to be applied to information supplied by an informant: under what circumstances should an individual be deemed a bystander witness rather than a traditional confidential informant; to what extent should the credibility/reliability standards established by *Aguilar*, *Spinelli* and their progeny be relaxed in situations involving a bystander witness; what type and what degree of corroboration should be required for reliance on information provided by a bystander witness. All of these are questions which should, in the interest of the proper and uniform administration of criminal justice, be addressed by this Court at this time.

Since the issues of credibility and reliability do not vanish simply because an affiant chooses to characterize an informant as an "unknown male" rather than as a "confidential informant," petitioner submits that if the *Aguilar-Spinelli* credibility/reliability requirements are to be less stringently applied in cases involving a bystander witness, there must be, as an essential first step, a factual basis set forth in the affidavit to support such a classification. Anything less would, without justification in law, logic, or policy, permit law enforcement officers to circumvent the constitutionally based credibility/reliability requirements simply by their choice of appellation.

In this case the factual basis for classifying the "unknown male" as a bystander witness is lacking. As the dissent noted, there was no statement in the affidavit that the "unknown male" had observed the vehicle leave the area moments before the explosion, and, in fact, he had left the area 15-30 minutes prior to the explosion. See App. 51a and n.10.[7]

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[7] The majority excused the absence of a factual assertion that the "unknown male" was an eyewitness and the absence of any other detail surrounding the "unknown male" and his information, in part, by relying on this Court's statement in *United States* v. *Ventresca*, 380 U.S. 102, 108 (1965), that affidavits are normally drafted in haste by nonlawyers (App.

However, even if the "unknown male" is deemed a bystander witness the questions of to what extent the *Aguilar-Spinelli* standards are to be relaxed and the nature and degree of corroboration required remain. Neither this Court nor any other court has held that classification as a bystander witness justifies the total abrogation of the credibility/reliability requirements. Regardless of the nomenclature employed to describe the source of the hearsay, the Magistrate must be supplied with constitutionally sufficient factual support for a conclusion that the source is credible and his information is reliable.

Thus, the critical question is the nature and degree of corroboration necessary to establish the requisite credibility and reliability. Indeed, as the majority noted, "[t]hat the 'unknown male' was not identified and that the affidavit did not state the circumstances of his observation might be grounds for discounting the statement had it stood alone" (App. 32a). Nonetheless, the majority affirmed reliance on the critical information, finding that Arnstein's 2 A.M. observation of a white Cadillac at the tavern provided sufficient corroboration to constitute a "sound basis for crediting the remark." *Id.* Petitioner submits that such "corroboration" does no more than give lip service to the credibility/reliability requirement.[8]

31a). However, in this case, the affidavit was submitted 37½ hours after the explosion, after consultation with the District Attorney (see App. 53a); invocation of the talisman of haste necessitated by evolving circumstances is, therefore, inappropriate.

[8] A white Cadillac is not yet an endangered species in the city of Boston; Arnstein's observation of such a vehicle in front of the tavern at 2 A.M. cannot, alone, constitute the corroboration necessary to elevate the statement of the "unknown male" concerning a white Cadillac at 4 A.M. to the level where a Magistrate could justifiably rely upon it to establish probable cause. Indeed, on its face, Arnstein's 2 A.M. observation is fully consistent with innocence. It is, petitioner submits, extremely unlikely that a tavern owner who intended to set an explosion at his establishment would park his own highly

Nor have the decisions of other Courts of Appeals, cited by the majority at App. 31a-32a and the dissent at App. 50a-51a, reduced the nature and degree of corroboration necessary to comply with the credibility/reliability requirements to the level considered sufficient by the majority. Rather, in those cases, factors absent here — name and address of the bystander witness; information which by its character and detail provided its own corroboration; detailed external corroboration — were held sufficient to justify reliance on such information.

In the absence of such corroboration, petitioner submits that the majority erred in relying on the information provided by the "unknown male" to justify a finding of probable cause[9] and requests that certiorari be granted to resolve the important and frequently recurring question of the standards to be applied in determining whether an individual can be classified as a bystander witness and, if so, the nature and degree of cor-

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conspicuous white Cadillac in front of the tavern two hours before he intended to set off an explosion. Nor were there any other indicia of credibility/reliability. The information was not self-corroborating by reason of great detail; the "unknown male" was not a victim or accomplice; there was no detailed external corroboration. See App. 51a-52a.

[9]Petitioner suggests that this case presents the paradigmatic example of the dangers of reliance on information provided by an individual identified only as an "unknown male," and the need for a strong factual showing of corroboration to establish credibility and reliability. As revealed at the hearings on petitioner's motion to suppress, the "unknown male" was not an unknown, neutral bystander. Rather, he was known to the investigating oficers as an individual nicknamed "Arky" who had at least a managerial interest (in fact he was the owner) in a nearby competing bar (App. 52). He had not stated that he had seen a vehicle leave the scene moments before the explosion. Rather, he had left the area 15-30 minutes prior to the explosion (App. 51a n. 10, 52a). Moreover, prior to the filing of the affidavit he had changed his story, recanting his identification of the car as a white Cadillac (App. 52a).

roboration necessary to meet the credibility/reliability requirements essential to reliance on his information to establish probable cause.

Conclusion.

The degree of certitude required to establish probable cause to search a private residence is a question which goes to the heart of the Fourth Amendment. The majority below has, without justification in law, logic or policy, lowered the degree of certitude required from the time of passage of the Fourth Amendment. Under its unprecedented standard, almost anytime there is reason to suspect that an individual has committed a crime,[10] and nothing affirmatively to exclude his home as a potential location of instrumentalities of that crime, there will be probable cause to search his home. Such a standard completely abrogates the "demand for specificity in the information upon which police action is predicated [which] is the central teaching of this Court's Fourth Amendment jurisprudence," *Terry* v. *Ohio*, 392 U.S. 1, 21 n.18 (1968), and constitutes an unprecedented encroachment on the rights and liberties guaranteed by the Fourth Amendment.

In addition, petitioner submits that the majority has, without legal or logical support, reduced the credibility/reliability standards for crediting information provided by a non-professional informant to a constitutionally deficient level.

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[10] Petitioner notes that the majority never concluded that the facts set forth in the affidavit established probable cause to arrest, and, indeed, no arrest warrant was sought prior to the search despite the fact that search warrants were obtained.

Determination of the proper standard is a recurring issue which has been addressed by many Courts of Appeals. It is an issue now ripe for resolution by this Court.

Accordingly, for all the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL NO.
77-53-M

UNITED STATES OF AMERICA

v.

JAMES FRANCIS MELVIN

Recommendation and Report on Defendant's Motion to Suppress.

May 3, 1977.

COHEN, M.

Pursuant to the provisions of 28 U.S.C. 636(b)(1)(B), defendant's Motion to Suppress was referred to this court for hearing and recommendation on March 11, 1977. Inasmuch as counsel for the defendant was engaged in trial in another district, this matter was not heard until April 18, 1977.

1. The motion to suppress relates to the two firearms referred to in the indictment which were seized during a search conducted under the authority of a search warrant[1] issued by the Honorable Samuel Adams, Justice of the Massachusetts Superior Court. Fairly read, the motion to suppress raises

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[1] The warrant itself was directed to paraphe[r]nalia which could be used to manufacture an explosive device.

various grounds challenging the seizure of the firearms, to wit: (1) that the affidavit in support of the application for a search warrant was insufficient on its face; (2) that a statement made by the defendant during the search to the effect that he did not have a state permit to possess firearms was obtained in violation of his *Miranda* rights, and, thus, the subsequent seizure of the firearms for that reason constituted an improper exploitation of the *Miranda* violation; and (3) that the scope of the search was so broad as to constitute "rummaging" in violation of the Fourth Amendment. Finally, defendant contended that the affiant who filed the affidavit in support of the application for the search warrant, or another police officer from whom the affiant obtained information, intentionally misrepresented certain facts in that affidavit. In this regard, paragraph 4 of the affidavit stated as follows:

> (4) That at about 6:00 PM on Thursday, November 18, 1976, I and other officers of the Intelligence Division interviewed Patrolman John Arnstein of Boston Police District 11. Patrolman Arnstein stated that at about 2:00 AM on Thursday, November 18, 1976, he had been on duty and patrolling the area of Rooney's Tavern and noted that a *white Cadillac* was parked at the front door and that a white male, about 35 years, 5-10, 180 lbs. was standing at the front door. Later that same morning, at about 3:56 AM, Patrolman Arnstein responded to a radio call relative to an explosion at Rooney's Tavern. Unon [sic] arrival and during his investigation, *an unknown male stated that a white Cadillac had left the scene moments before the explosion*. (Emphasis added).

As to these underscored allegations, defendant proffered (1) that Patrolman Arnstein, in fact, observed a white 1972 or 1973 Cadillac parked in front of Rooney's Tavern, and that his intentional omission of that fact was the equivalent of an intentional misrepresentation, since the search warrant was issued, in part, on the basis that the defendant owned a white 1976 Cadillac; and (2) that the alleged "unknown male" was, in fact, known to Patrolman Arnstein, and that that person did not, in fact, tell Patrolman Arnstein that a white Cadillac left the scene moments after the explosion.

On the basis of these proffers of proof, this court received limited evidence to determine whether or not the proffers were sufficient to permit further exploration beneath the four corners of the affidavit in support of the search warrant. With respect to the first proffer, John Rooney, owner of Rooney's Tavern, testified that he arrived at the scene of his tavern some time after the explosion. At that time, according to Rooney, Patrolman Arnstein told him that he [Arnstein] had observed a 1972 or 1973 Cadillac parked in front of Rooney's Tavern before the explosion. Patrolman Arnstein, however, denied that he had told Rooney that the white Cadillac was a 1972 or 1973 model.

On the other issue, Patrolman Arnstein testified that the "unknown male" was, in fact, unknown to the extent that he did not know his first name. He did testify, however, that he knew this "unknown male" by a nickname, and that he knew that this "unknown male" worked in the area of Rooney's Tavern. At this point, counsel for defendant stated that he [counsel] was aware of the name of the person referred to as an "unknown male," that he [counsel] had taken this person's statement under oath, and that this alleged "unknown male" had categorically denied that he had given the reported information — i.e., that a white Cadillac had left the area of Rooney's Tavern moments after the explosion — to Patrolman Arnstein.

Because of a question in this court's mind as to whether the "unknown male" referred to in the affidavit in support of the search warrant was, in fact, the same person from whom counsel for defendant obtained a statement under oath, this court ordered that the government and defense counsel submit, on an in camera basis, the name, if known, of the alleged unknown male. Those submissions[2] were made on or about April 22, 1977, and, on the basis of those submissions, this court finds that a factual issue exists concerning what, if anything, was told to Patrolman Arnstein by the alleged "unknown male."

2. For the reasons more fully set forth in this court's Memorandum and Order in *United States* v. *Ilario Zannino, Et Al.*, Crim. No. 77-30-T (April 20, 1977) (a copy of which is attached hereto), this court concludes that a defendant may not, on a motion to suppress, delve beneath the four corners of supporting affidavits by the mere asking, or, indeed, by simply alleging, without substantiation, that the affiant made an intentional misrepresentation in the affidavit. In this case, however, the defendant has presented evidence which, if believed, would tend to show that Patrolman Arnstein or the affiant might have deliberately failed to call to the issuing court's attention that the white Cadillac which Arnstein observed before the explosion was a 1972 or 1973 model — not a 1976 model similar to that owned by the defendant. Moreover, if defendant's witness(es) were to be believed, the "unknown male" did not tell Patrolman Arnstein that a white Cadillac left the area of Rooney's Tavern moments after the explosion. In this court's view, if such were the case, the statements to the contrary could be deemed, at the very least, "intentional, relevant and non-trivial" misstatements which, under the rationale of *United States* v. *Belcufine*, 508 F.2d 58

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[2]Those submissions have been sealed as Impounded Exhibit "A".

(1st Cir. 1974), would invalidate the warrant, and hence the search, in this case.

In this setting, it is clear to this court that the motion to suppress should be returned to the district court judge for further hearings — at least for the purpose of resolving the factual questions now extant. In the *Belcufine* case, the United States Court of Appeals for this Circuit clearly and unequivocally stated that, in cases "where the veracity of an affidavit underlying a warrant is challenged," the conflicting facts must be resolved by a district court judge — not a magistrate. *Id.* at 64. To be sure, the Court of Appeals did not have the benefit of the recent amendments to the Magistrate's Act which permit magistrates to receive evidence and make recommendations on motions to suppress. 28 U.S.C. 636(b)(1)(B). But since the last word on this subject in this Circuit suggests to the contrary, prudence mandates that the motion to suppress should, in the first instance, be returned to the district court judge for further hearings.

All orders heretofore entered by this court relating to the motion to suppress are hereby vacated, and should be renewed before the district court prior to further hearings on that motion.

LAWRENCE P. COHEN,
United States Magistrate.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA

v. CRIMINAL ACTION
No. 77-53-M

JAMES FRANCIS MELVIN

Memorandum.

MURRAY, Senior District Judge

This case came on to be heard under the following circumstances on defendant's motion to suppress. The motion was referred to the magistrate originally for hearing and recommendation. Among the grounds of the motion is the defendant's assertion that certain intentionally misrepresentations of fact were averred in paragraph 4 of the affidavit filed in support of the application for the search warrant. Paragraph 4 contained the following averments:

> That at about 6:00 PM on Thursday, November 18, 1976, I and other officers of the Intelligence Division interviewed Patrolman John Arnstein of Boston Police District 11. Patrolman Arnstein stated that at about 2:00 AM on Thursday, November 18, 1976, he had been on duty and patrolling the area of Rooney's Tavern and noted that a *white Cadillac* was parked at the front door and that a white male, about 35 years, 5-10, 180 lbs. was standing at the front door. Later that same morning, at about 3:56 AM, Patrolman Arnstein responded to a radio call relative to an explosion at Rooney's Tavern.

> Unon [*sic*] arrival and during his investigation, *an unknown male stated that a white Cadillac had left the scene moments before the explosion.* (Underscoring added.)

The alleged intentional misstatements are underscored as noted above. Before the magistrate, defendant offered to prove that Patrolman Arnstein had declared that he observed a white 1972 or 1973 Cadillac parked in front of Rooney's Tavern; that the *unknown male* was indeed known to Patrolman Arnstein, and that such male did not tell Arnstein that a white Cadillac had left the scene moments before the explosion. The magistrate received some evidence to determine whether the proffered matters were sufficient to permit further exploration by the district judge of the challenge to the veracity of the averments in paragraph 4. *United States* v. *Belculfine*, 508 F.2d 58 (1st Cir. 1974). Having concluded the proffered evidence, if believed, would render statements in the affidavit to the contrary "intentional, relevant and non-trivial misstatements", *id.* at 62, the magistrate returned the motion to the district judge for hearing of defendant's challenge to the veracity of the specified averments of paragraph 4.

The motion was heard on the testimony of witnesses called by the parties, the report filed by the police, a video-taped deposition, and the arguments of counsel. Putting to one side at this juncture defendant's claim that the unknown male was indeed known to Arnstein, the court finds that the challenge to the other statements raises the issue of the credibility of the witnesses presented. If the statements are proved untrue, the motion to suppress the evidence obtained pursuant to the warrant should be suppressed; if not untrue the motion should be denied on this aspect of the challenge. Defendant has the burden of satisfying the court that these statements were not true. That burden has not been sustained.

Although Arnstein's statements were contradicted by the testimony of John Rooney, co-owner with defendant of Rooney's Tavern and by testimony of Arthur Sutliff, Arnstein's testimony in support of the challenged statements was forthright, clear and unwavering and was corroborated in important respects by Lieutenant Boyajian of the Massachusetts State Police. There was no showing of any bias or prejudice on the part of any police officer against the defendant or the owners of Rooney's Tavern. Indeed, the only suspicion of bias or animosity that emerged from the hearing focused on the attitude of Rooney toward Sutliff and Sutliff's attitude toward the new owners of Rooney's Tavern. Nothing in the police report impugned Arnstein's testimony in the slightest degree. In this aspect of the motion the defendant failed to persuade the court that it should be granted.

The facts concerning the challenge to the averment in paragraph 4 of the *unknown male* establish the following. Arnstein recognized Sutliff after the explosion as a person he had seen before at the Circle Cafe (an establishment located approximately 90 yards distant from Rooney's Tavern); he had never before talked with Sutliff; he did not know the name "Arthur Sutliff"; all he knew was that the person had the nickname "Arky". Arnstein gave to Officer John Lydstone the information set forth in paragraph 4 of the affidavit. Lydstone had knowledge that a person with the nickname "Arky" ran an establishment near the Rooney Tavern, but he never had met the person known as "Arky" and did not know his true name. Lydstone went to the Circle Cafe on the evening of November 18 and inquired for "Arky" of a waitress, and received the response that "Arky" was not present. No additional efforts were made to learn the true name of the person identified in the affidavit as "unknown male". Lydstone used the expression "unknown male" in the affidavit "because the man was not known to" him.

If under the circumstances the phrase "unknown male" was inaccurate, it was only because a fuller description of the person might have been supplied, e.g., "a person known by me to use the nickname Arky and who frequents the Circle Cafe". But to insist that such description was required is to yield to the needless exercise of correcting police language of usage. There was no showing that in and around the area of the Circle Cafe and Rooney's Tavern the person known as "Arky" was known by any other name. There was no showing that if there was an inaccuracy, it resulted from any recklessness on the part of the police. Moreover, assuming the description "unknown male" was a misstatement, a view which the court does not entertain, it has not been demonstrated that it was intentional or that it was material on a showing of probable cause. Defendant has failed to satisfy the court that paragraph 4 contained "intentional, relevant and non-trivial misstatements" in the respects specified.

Accordingly, the motion to suppress is denied as regards the challenge to paragraph 4.

FRANK J. MURRAY,
Senior District Judge.

November 15, 1977

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL NO.
77-53-M

UNITED STATES OF AMERICA

v.

JAMES FRANCIS MELVIN

Report and Recommendation on Defendant's Motion to Suppress.

November 18, 1977

COHEN, M.

By his motion, defendant moves to suppress the sawed-off shotgun and sawed-off rifle referred to in Counts 1 and 2 of the indictment, respectively. Both firearms were seized during the execution of a search warrant by state and federal authorities directed against the home and vehicle of the defendant. The warrant itself was issued by the Honorable Samuel Adams, Associate Justice of the Massachusetts Superior Court.

To the extent that this motion is before this court, defendant makes three general contentions, i.e., (1) that the affidavit in support of the warrant was insufficient on its face; (2) that the discovery and seizure of the firearms was the result of an improper exploitation of the failure of police officers to give

defendant his *Miranda* warnings; and (3) that the officers should have obtained a new search warrant before seizing the firearms referred to in the indictment.[1] These issues are discussed seriatim.

A. Defendant first challenges the sufficiency of the affidavit in support of the application for a search warrant. That affidavit, prepared by Detective John E. Lydstone of the Boston Police Department, set forth the following facts:

(a) That on November 18, 1976, Lydstone and other officers investigated an explosion at Rooney's Tavern in Dorchester;

(b) That Lydstone was advised by members of the bomb squad that certain pieces of wire found outside and inside the premises indicated that the explosion was caused by dynamite;

(c) That Lydstone was told by Patrolman John Arnstein that —

> . . . at about 2:00 AM on Thursday, November 18, 1976, he had been on duty and patrolling the area of Rooney's Tavern and noted that a white Cadillac was parked at the front door and that a white male, about 35 years, 5-10, 180 lbs. was standing at the front door. Later that same morning, at about 3:56 AM, Patrolman Arnstein responded to a radio call relative to an explosion at Rooney's Tavern. Unon [sic] arrival and during his investigation, an *unknown male* stated that a white Cadillac had left the scene moments before the explosion. (Emphasis added.)

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[1] A fourth issue — i.e., that the affidavit contained "intentional, relevant and non-trivial misstatements" under the rationale of *United States* v. *Belcufine*, 508 F. 2d 58 (1st Cir. 1972) — has been resolved adversely to the defendant by the Court.

(d) That Patrolman Arnstein identified a photograph of defendant as bearing a strong resemblance to the person whom he had observed at 2:00 a.m. that morning standing at the front door of Rooney's Tavern;

(e) That the defendant was listed as an owner of Rooney's Tavern, and the operator of a white 1976 Cadillac;

(f) That the defendant lived at 38 Ells Avenue, Weymouth, and that the defendant's white Cadillac was parked in the driveway of that location at 10:00 a.m. that morning; and

(g) That Detective Lydstone was advised by officers of the bomb squad that, in their opinion, the type of bomb capable of causing the sort of damage suffered at Rooney's Tavern ". . . would generally be assembled in a workshop of some sort, as opposed to in the vehicle, because of the type of tools and materials needed to assemble the bomb."

On the basis of these facts, Detective Lydstone sought a search warrant for defendant's vehicle and home. As noted above, those warrants were issued by Associate Justice Adams on November 19, 1976.

1. With respect to this Affidavit, defendant contends that the facts were insufficient on their face to establish probable cause linking defendant with the bombing, or probable cause that implements of the bombing would be found in defendant's house. In connection with this contention, defendant first contends that the Court should disregard that information imparted by the "unknown male" — i.e., that a white Cadillac had left the scene moments before the explosion — because there was nothing before Justice Adams indicating the reliability of this unknown male, or how the unknown male learned about the information which he told Patrolman Arnstein, as required by the rationale of *Aguilar* v. *Texas*, 378 U.S. 108 (1964), and *Spinelli* v. *United States*, 393 U.S. 410 (1968).

In this court's view, Justice Adams properly considered the information reported by the unknown male to Patrolman Arn-

stein. As noted in *United States* v. *Burke*, 517 F.2d 377, 380 (2d Cir. 1975):

> . . . there has been a growing recognition that the language in *Aguilar* and *Spinelli* was addressed to the particular problem of professional informers and should not be applied in a wooden fashion to cases where the information comes from an alleged victim of or witness to a crime.

Other circuits have accepted a similar interpretation of the *Aguilar* and *Spinelli* rationale. E.g., *United States* v. *Mahler*, 442 F.2d 1172, 1774-1175 (9th Cir.), cert. denied, 404 U.S. 993 (1971); *United States* v. *Bell*, 457 F.2d 1231, 1238-1239 (5th Cir. 1972); *McCreary* v. *Sigler*, 406 F.2d 1264, 1269 (8th Cir.), cert. denied, 395 U.S. 934 (1969); *United States* v. *Unger*, 469 F.2d 1283, 1287 (7th Cir. 1972), cert. denied, 411 U.S. 920 (1973); *United States* v. *McCoy*, 478 F.2d 176, 179 (10th Cir.), cert. denied, 414 U.S. 828 (1973); cf. *United States* v. *Harris*, 403 U.S. 573 (1971). This "growing recognition" is not mere ipse dixit on the part of the Courts referred to above. To the contrary, this interpretation is fully consistent with the extent and scope of the *Aguilar-Spinelli* rationale. As pointed out by the Court in *McCleary* v. *Sigler*, *supra*, at 1268:

> The additional significance we glean from *Spinelli* is that the magistrate must assure himself that the affidavit is not merely based upon "casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." 89 S.Ct. at 589. However, older principles repeated in *Spinelli* are worthy of abbreviation here. In dealing with the sufficiency of affidavits

(1) only a *probability* of criminal conduct need be shown, (2) standards less rigorous than rules of evidence determine sufficiency, (3) common sense controls and (4) "great deference" should be shown by the courts to a magistrate's determination of probable cause.

In this context, Justin [*sic*] Adams properly considered the information imparted by the "unknown male." If the purpose of the *Aguilar-Spinelli* rationale is to assure the issuing judicial officer that he is not relying upon "casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation," then that rationale would not have been furthered to the slightest by rejecting the information received from the "unknown male." Reading the affidavit in its entirety, it was clearly reasonable for Justice Adams to conclude that the "unknown male" witnessed the white Cadillac leave the scene moments before the bombing.[2] Thus read, the possibility that the information imparted consisted of "casual rumor" or "mere gossip" is, at best, *de minimus*. To the contrary, Justice Adams was obviously reasonable in concluding that the "unknown male" reported what he observed, and observed what he reported.

Moreover, under the *Aguilar-Spinelli* test, information imparted [by] an "informant" may be credited if independent facts brought to the attention of the judicial officer corroborate — and thus lend credence to — the information so reported. In the present case, the "unknown male" reported that a white Cadillac left the scene moments before the explo-

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[2] Although the affidavit did not state that the "unknown male" actually saw the white Cadillac drive away, given the fact that Patrolman Arnstein immediately responded to the bombing, and acquired this information from the "unknown male" shortly thereafter, Justice Adams could reasonably conclude that the "unknown male" related an eyewitness account.

sion. The explosion, according to Patrolman Rooney [*sic*], occurred sometime prior to 3:56 a.m. And Patrolman Arnstein himself had seen a white Cadillac parked in front of Rooney's Tavern at approximately 2:00 a.m. that same morning. In this context, the statement of Patrolman Arnstein corroborated the information given by the "unknown male", and Justice Adams properly credited the information supplied by the "unknown male."

Thus viewed, the affidavit stated sufficient facts linking the defendant with the bombing. Under settled principles, given the fact that affidavits are invariably prepared in haste because of evolving and ambiguous circumstances, *United States* v. *Cruz-Pagan*, 537 F.2d 554, 557 (1st Cir. 1977), affidavits in support of a search warrant must be read in a commonsense and realistic — as opposed to a hypertechnical — fashion, *United States* v. *Ventresca*, 380 U.S. 102, 105-106 (1965); *United States* v. *Poulack*, 556 F.2d 83 (1st Cir. 1977), a strong preference should be accorded to searches conducted pursuant to a warrant, *Ventresca*, *supra*, the finding of probable cause by a judge or magistrate should be accorded "great deference" by the reviewing court, *Spinelli*, *supra*, at 419, and the resolution of doubtful or marginal cases should be determined by the preference accorded to warrants. *Ventresca*, *supra*; *Jones* v. *United States*, 362 U.S. 257 (1963); *United States* v. *Christenson*, 549 F.2d 53 (8th Cir. 1977).

In the present case, the facts, and the reasonable inferences drawn therefrom, before Justice Adams showed: (1) that the defendant (or a person of defendant's likeness) was observed standing at the front door of Rooney's Tavern two hours before the bombing; (2) that a white Cadillac was parked in front of the tavern at the same time; (3) that defendant was an owner of Rooney's Tavern and of a white Cadillac; and (4) that a white Cadillac was observed leaving the scene of Rooney's Tavern moments before the explosion. Since part of

the detonation equipment was found inside the tavern, the clear inference to be drawn was that someone who had access to the tavern (such as the defendant who was listed as an owner) was responsible for placing the device inside that tavern. In keeping with the established notion (*Spinelli*, *supra*, at 419) —

> . . . that only the probability, and not a prima facie showing of criminal activity is the standard of probable cause, *Beck* v. *Ohio*, 379 U.S. 89, 96 (1964) . . .

it is clear that Justice Adams properly concluded that, in all probability, defendant was responsible for the bombing at Rooney's Tavern. Moreover, applying the same principles, Justice Adams properly concluded that, in all probability, evidence and implements of the bombing would be found in defendant's home. According to members of the bomb squad as set forth in the affidavit, the explosive device was such as could require assembly at a work bench with the aid of tools. Although there is always the possibility that the bomb could have been manufactured elsewhere, that possibility does not square with the real world. Bombers do not make bombs in public, nor do they use a neighbor's workshop. If secrecy is an element of the bomber's doings, then the security of one's home is the most logical place to assume as the area where the bomber's doings are done. Thus, Justice Adams properly concluded that, in all probability, the bomb was assembled in the defendant's house.

For these reasons, this court recommends that the Court deny defendant's motion to suppress insofar as it challenges the sufficiency of the affidavit.

2. Defendant next contends that the seizure of the firearms was the product of an exploitation of the failure of police officers to give defendant his *Miranda* warnings.

According to the evidence before this court, Detective Robert F. Ryan of the Boston Police Department, together with other local law enforcement officers and agents from the Alcohol, Tobacco and Firearms Division, executed the warrant at approximately 5:30 p.m., November 19, 1976. Upon arriving at the premises, Detective Ryan was greeted by defendant's wife, who was told as to his purpose. She told Detective Ryan that the defendant was upstairs in a bedroom. Detective Ryan met the defendant in the bedroom and again explained his purpose. At this time, in order to avoid any problems during the search and to ensure the safety of the officers, Detective Ryan asked the defendant if there was any money or firearms in the house. Defendant said that there was no money, but that there were firearms. Detective Ryan then asked the defendant if he [defendant] would show or get him the firearms, and defendant said that he would. The defendant then went to the kitchen and began to enter steps leading to the cellar. At this point, Detective Ryan asked the defendant if he had an FID (Firearms Identification Card) card or a license to carry firearms, and defendant responded that he did not. The defendant then told Detective Ryan that they would have to find the firearms themselves. All the above conversations took place prior to *Miranda* warnings being given to the defendant.

Prior to the time the defendant and Detective Ryan had gone from the bedroom to the kitchen, officers had already begun searching defendant's cellar. Between 5 and 10 minutes of the beginning of that search, ATF Special Agent William J. Murphy — who was searching for implements of an explosive device — found the sawed-off shotgun in a duffle bag underneath a workbench in the cellar. At the same time, Detective Lydstone found the sawed-off rifle in the same area. No implements of a bomb had yet been found.

Approximately 30 to 40 minutes later, a blasting cap and other items were found in defendant's vehicle. At this time, defendant was placed under arrest and was given his *Miranda* warnings. Until the time of his formal arrest, defendant was detained in the kitchen with his wife, and, according to Detective Ryan, he was not free to leave.

Against this factual background, relying upon the rationale of *Wong Sun* v. *United States*, 371 U.S. 471 (1963), defendant contends that the discovery and seizure of the firearms referred to in the indictment was the fruit of a primary illegality — i.e., the failure to advise defendant of his Miranda rights — and, thus, that the firearms should be suppressed.

In the circumstances, there is no occasion to consider whether defendant — who was kept in his kitchen with his wife during the search — was in "custody" within the meaning of *Miranda*, cf. *Orozco* v. *Texas*, 394 U.S. 324 (1969), or whether the routine questions initially put by Detective Ryan was the sort of "interrogation" contemplated by the *Miranda* opinion. For even assuming that *Miranda* warnings should have been given, the *Wong Sun* rationale does not apply.

The test to be applied is neither a *per se* nor a "but for" rule. See *Brown* v. *Illinois*, 422 U.S. 590, 603 (1975). The question to be asked in each case is whether the particular evidence was obtained "by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun*, at 488. On this latter score, it is clear that the discovery of the firearms was wholly unrelated to the statements made by the defendant. According to Detective Ryan, the search party had planned to search the entire house in order to find evidence and implements of an explosive device. Police officers and federal agents had already begun to search the cellar even before the statements were made. The discovery was made as a result of the search for evidence and implements of the explosive device, and would have been found irrespective of the statements made by

the defendant. In these circumstances, it is clear that the firearms were discovered by means wholly independent of the alleged primary illegality, see *Virgin Islands* v. *Gereau*, 502 F.2d 914, 926-928 (3rd Cir. 1974), cert. denied, 420 U.S. 909 (1975); *United States* v. *Falley*, 489 F.2d 33, 40-41 (2d Cir. 1973); *United States* v. *Schipani*, 414 F.2d 1262 (2d Cir. 1969), cert. denied, 397 U.S. 922 (1970), and no purpose underlying the exclusionary rule would be served by excluding evidence of the firearms found during the otherwise lawful search. *Virgin Islands* v. *Gereau*, *supra*; *United States* v. *Edmonds*, 432 F.2d 577 (2d Cir. 1970).

In short, the police officers may have discovered "fruits," but they were not from the "poisonous tree." Accordingly, this court recommends that the Court deny the motion insofar as it is based on this ground.

3. Finally, defendant contends that the officers should have obtained a second warrant before seizing the firearms. Under settled principles, of course, officers making a legal search may seize contraband discovered during that search even though it is not listed in the warrant. E.g., *Abel* v. *United States*, 362 U.S. 217 (1960); *Harris* v. *United States*, 331 U.S. 145 (1947); *United States* v. *Sorenson*, 330 F.2d 1018 (2d Cir.), cert. denied, 380 U.S. 945 (1965). Defendant apparently does not dispute this settled principle, but contends that — with the exception of defendant's statement to the effect that he did not have an FID card or a license to carry firearms (a statement which defendant contends was improperly obtained as discussed above) — the agents did not have probable cause to believe that the sawed-off shotgun and rifle were contraband, since it technically is possible to legally register and possess such firearms.

In this court's view, defendant's contention is fully answered by the language of the Court in *United States* v. *Canestri*, 518

F. 2d 269, 274-275 (2d Cir. 1975), wherein it was said in relation to a similar argument:

> While it is possible for a person to register and therefore possess legally a sawed-off shotgun or an automatic weapon, it is not a prerequisite for a legal seizure that the officers know at the time of the search that the seized weapons were not registered. *United States* v. *Story*, 463 F.2d 326, 328 (8th Cir.), cert. denied, 409 U.S. 988, 93 S.Ct. 343, 34 L.Ed. 2d 254 (1972); *United States* v. *Cecil*, 457 F.2d 1178, 1180-81 (8th Cir. 1972); *United States* v. *Zeidman*, 444 F.2d 1051, 1054 (7th Cir. 1971); *United States* v. *Ciaccio*, 356 F. Supp. 1373, 1378 (D.Md. 1972).
>
> As the Ninth Circuit noted in *Porter* v. *United States*, 335 F. 2d 602, 607 (1964), cert. denied, 379 U.S. 983, 85 S.Ct. 695, 13 L.Ed. 2d 574 (1965), "a sawed-off shotgun in private hands is not an intrinsically innocent object. The possession of it is a serious crime, except under extraordinary circumstances." In 1972, there were less than 15,000 registered sawed-off shotguns in the United States, most of which were registered to governmental agencies for training purposes or to residents of Western states. *United States* v. *Cecil*, *supra*, 457 F.2d at 1182 n.1 (Heaney, Jr., dissenting). In light of these circumstances we think that the district court properly concluded that the officers had probable cause to believe that the seized weapons were contraband. (footnote omitted).

In the present case, in addition to what has been said above, the sawed-off shotgun was concealed in a duffel bag which, in turn, was underneath a workbench in the defendant's cellar. Thus, the officers clearly had probable cause to believe that the firearms were unregistered in violation of federal law, and

those firearms were properly seized as contraband without a warrant.

For the foregoing reasons, this court recommends that the motion to suppress be denied.

LAWRENCE P. COHEN,
United States Magistrate.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA

v. CRIMINAL ACTION
No. 77-53-M

JAMES FRANCIS MELVIN

Memorandum.

MURRAY, Senior District Judge

Defendant's motion to suppress evidence, insofar as the motion alleged certain intentional misrepresentations of fact were averred in paragraph 4 of the affidavit of Detective John Lydstone of the Boston Police which was offered in support of the application for a search warrant, was denied after hearing. (See Memorandum Decision, November 18, 1977.) Defendant's motion for reconsideration of that decision was denied.

The case is now before the court on defendant's second motion for reconsideration of the motion to suppress on the ground of newly discovered evidence of material misstatements and omissions in paragraph 4 of the affidavit. The newly discovered evidence is alleged to appear in the testimony

of Detective Lydstone and of Detective Martin Coleman of the Boston Police given to a Justice of the Superior Court of Massachusetts on May 18 and 19, 1978. Defendant argues that the misrepresentations, if excised, and the omitted information, if supplied, would leave the affidavit "devoid of probable cause" connecting the defendant with the explosion at Rooney's Tavern.

The motion for reconsideration is allowed and, the court finding that the motion to suppress on the ground alleged is without merit, denies the same.

The person whose veracity is the object of impeachment by defendant is the affiant, John Lydstone. Defendant's burden is to prove deliberate falsehood or reckless disregard for the truth on the part of Lydstone in the particulars of the affidavit that are claimed to be false. Examination of the transcripts of May 18 and 19, 1978, discloses that Lydstone omitted from the affidavit matters which he deemed irrelevant, and included information which he received from Patrolman Arnstein. Examination of the transcript of April 18, 1977 of Lydstone shows no substantial or material deviation from his later testimony. In the latter transcript (p. 90) the testimony of Patrolman Arnstein confirms the information which Lydstone included in the affidavit.

Defendant has not shown any deliberately false statements or statements made with reckless disregard for the truth in paragraph 4 of Lydstone's affidavit, and has not shown omissions consciously made to falsify the affidavit. *See Franks* v. *Delaware*, ____ U.S. ____, Slip Opinion No. 77-5176 (June 26, 1978). Let an order enter denying defendant's motion to suppress, and an order assigning the case for trial on August 21, 1978 at 10:00 AM.

FRANK J. MURRAY,
Senior District Judge.

July 27, 1978

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA

v.

CRIMINAL ACTION
No. 77-53-M

JAMES FRANCIS MELVIN

Order

MURRAY, Senior District Judge

This case came on to be heard on the report and recommendation of the Magistrate, and the defendant's objections thereto, on the defendant's motion to suppress, and thereupon, upon consideration thereof, the report and recommendation be and hereby are accepted and adopted. Accordingly, the motion to suppress is hereby denied on every ground advanced by defendant.

FRANK J. MURRAY,
United States Senior District Judge.

August 3, 1978

United States Court of Appeals
For the First Circuit

No. 78-1437

UNITED STATES OF AMERICA,

APPELLEE,

v.

JAMES FRANCIS MELVIN,

DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Frank J. Murray, *U.S. District Judge*]

Before Coffin, *Chief Judge*,
Campbell and Bownes, *Circuit Judges*.

Martin G. Weinberg, with whom *Judith H. Mizner*, and *Oteri & Weinberg*, were on brief, for appellant.
Robert B. Collings, First Assistant United States Attorney, Chief, Criminal Division, with whom *Edward F. Harrington*, United States Attorney, was on brief, for appellee.

April 13, 1979

Campbell, *Circuit Judge*. This is an appeal by James Francis Melvin from his conviction for the possession of two firearms, a sawed-off shotgun and a sawed-off carbine, which were not registered to him in the National Firearms Registration and Transfer Record, in violation of 26 U.S.C. § 5861(d). The guns were discovered and seized by police officers during a search of Melvin's home pursuant to a warrant. Melvin contends that the district court erred in refusing to suppress the firearms as evidence against him at trial. He argues (1) that the search

warrant was issued without probable cause; (2) that it was issued upon an affidavit containing a material false statement made in reckless disregard for the truth; and (3) that the seized weapons were the fruits of an interrogation conducted in violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966). As we conclude that the district court properly admitted the seized firearms into evidence, we affirm the conviction.

I.

We address first the question of probable cause. The warrant, authorizing the search of appellant's home at 38 Ells Avenue, Weymouth, was issued by a justice of the Massachusetts Superior Court upon the affidavit of Detective John E. Lydstone of the Boston Police Department. The objects sought by the search as authorized by the warrant were instrumentalities used in the commission of a bombing, not the firearms which were found and introduced against appellant at trial.[1]

In passing on the probable cause basis for the search warrant, we may consider only information brought to the issuing judge's attention. *Aguilar* v. *Texas*, 378 U.S. 108, 109 n.1 (1964). The judge issued the warrant solely on the basis of Detective Lydstone's affidavit, which stated the facts in material respects as follows. At approximately 4:00 a.m. on November 18, 1976, there was an explosion at Rooney's Tavern in Dorchester, Massachusetts. Patrolman

[1] Apparently none of the instrumentalities of the bombing sought by the warrant were found in the house, although the returned warrant reported that electrical and friction tape, a current tester, and six pairs of wire cutters had been discovered. The judge also issued a warrant authorizing a search of appellant's car, however, and appellant's brief indicates that what appeared to be part of a blasting cap was found in the car. Based on this evidence, appellant apparently was arrested for having caused the explosion, but he was acquitted after a trial in state court.

Arnstein of the Boston Police Department arrived at the tavern a few minutes after the explosion. According to the affidavit, shortly after Arnstein's arrival "an unknown male stated that a white Cadillac had left the scene moments before the explosion." Earlier that morning, at about 2:00 a.m., Arnstein while patrolling the area had noticed a white Cadillac parked in front of Rooney's Tavern and a white male, about 35 years old, 5'10" tall, and 180 lbs., standing at the tavern's front door. Detective Lydstone in the affidavit affirmed further:

> "(5) That I gave photographs of persons known by me to frequent the area of Rooney's Tavern and Patrolman Arnstein indicated that a photograph of James Melvin bore a strong resemblance to the man that he had seen at the Tavern door at 2:00 AM that morning.
>
> "(6) That James Melvin is a white male, 34 years old, 5'-9", 165 lbs. is listed as an owner of Rooney's Tavern and that he operates a 1976 Cadillac, color white, Mass. Reg. D66-105 and he resides at 38 Ells Ave., Weymouth.
>
> "(7) That at about 10:00 PM Thursday, November 18, 1976, Detective Martin Coleman of the Intelligence Division responded to 38 Ells Ave., Weymouth and observed that the white Cadillac belonging to Melvin was parked at that location."

Lydstone stated also that Sergeant Ruglario and Patrolman Cunningham of the Boston Police Department's bomb squad reported finding at the rear of the tavern a 103 foot length of brown wire and another length of similar brown wire inside the tavern, the latter attached to yellow and blue wires of the type and in a configuration consistent with use in detonating a stick of dynamite, and that "[i]t is the opinion of these bomb squad officers that the above paraphernalia was in fact used to cause the explosions at

Rooney's Tavern." Finally, Detective Lydstone requested a warrant for the following reasons:

> "(8) That I have discussed the above stated facts and their inferences with other members of the Intelligence Division and it is our collective opinion that there is probable cause to believe that James F. Melvin was responsible for the explosion at Rooney's Tavern and respectfully request that the Court issue search warrant for Melvin's white Cadillac, Mass. Reg. D66-105.
>
> "(9) I have discussed the facts and inferences of this case with Sgt. Ruglario and Patrolman Cunningham of the Bomb Squad. They inform me that the type of device capable of causing the above damage (at Rooney's Tavern) would generally be assembled in a workshop of some sort, as opposed to in the vehicle, because of the type of tools and materials needed to assemble the bomb. Therefore, I also request a search warrant for James Melvin's residence at 38 Ells Avenue, Weymouth, Massachusetts. That residence is described as a single-family, brown, two-story house with a garage attached."

The warrant was issued on November 19 and the search conducted later that day.

The fourth amendment protects against "unreasonable searches and seizures," and provides that "no Warrants shall issue, but upon probable cause." The Supreme Court in *Spinelli* v. *United States*, 393 U.S. 410, 419 (1969), summarized the principles that govern the issuance and review of search warrants. These "established propositions" are,

> "that only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause, *Beck* v. *Ohio*, 379 U.S. 89, 96 (1964); that affidavits of probable cause are tested by much less rig-

orous standards than those governing the admissibility of evidence at trial, *McCray* v. *Illinois*, 386 U.S. 300, 311 (1967); that in judging probable cause issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense, *United States* v. *Ventresca*, 380 U.S. 102, 108 (1965); and that their determination of probable cause should be paid great deference by reviewing courts, *Jones* v. *United States*, 362 U.S. 257, 270-271 (1960)."

Appellant misapprehends two fourth amendment principles which we wish to clarify at the outset. First, appellant reads the phrase "probable cause" with emphasis on the word "probable," and would define it mathematically to mean "more likely than not" or "by a preponderance of the evidence." This reading is incorrect. The phrase is less stringent than that — the words "reasonable cause" are perhaps closer to what is meant. The Supreme Court has asserted that "'reasonableness' is the overriding test of compliance with the Fourth Amendment," *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 559 (1978); has approvingly quoted authority equating "probable cause" with "reasonable grounds to believe," *id.* at 556 n.6; and has even used the phrases "reasonable cause" and "probable cause" interchangeably, *compare id.* at 556, *with id.* at 557. *See also Brinegar* v. *United States*, 338 U.S. 160, 175-76 (1949).

Appellant's second misunderstanding is his contention that for the warrant to have been proper there had to have been probable cause to believe that he was responsible for the explosion. This would mean that the search of appellant's home was improper unless the police had sufficient evidence prior to the search to arrest him. Such a requirement would render property searches ineffective as tools of criminal investigations in many cases, and it

has been rejected by the Supreme Court. The Court has ruled that " '[o]nce it is established that probable cause exists to believe a federal crime has been committed a warrant may issue for the search of any property which the magistrate has probable cause to believe may be the place of conccalment of ['fruits, instrumentalities, or evidence,' *see* 436 U.S. at 554,] of the crime.' " *Zurcher* v. *Stanford Daily*, 436 U.S. at 558, *quoting United States* v. *Manufacturers National Bank*, 536 F.2d 699, 703 (6th Cir. 1976), *cert. denied sub nom. Wingate* v. *United States*, 429 U.S. 1039 (1977). Moreover, the Court has declared that "it is untenable to conclude that property may not be searched unless its occupant is reasonably suspected of crime and is subject to arrest." 436 U.S. at 559. It is true that *Zurcher* involved a search of property possessed by a third party who was not suspected of the criminal activity being investigated, and held only that such a non-suspect's property could be searched without probable cause to arrest him. But, the rule is obviously the same with respect to a person who the police do indeed suspect but do not have probable cause to arrest; such a person's property may be searched upon probable cause to believe that fruits, instrumentalities, or evidence of the crime are present, even though the products of the search may implicate him. *Carroll* v. *United States*, 267 U.S. 132, 158-59 (1925); 436 U.S. at 556-58.

In this case it is undisputed that the judge who issued the warrant had probable cause to believe that a crime had been committed. Whether he properly issued the warrant therefore depends upon whether he had probable cause to believe that instrumentalities of the crime were present in appellant's home. Appellant claims that such probable cause was lacking because of insufficient evidence linking him to the bombing and inadequate reason to expect that

instrumentalities would be found in his home even if he had been involved.

The evidence described in the affidavit connecting appellant to the explosion was the "unknown male's" statement that a white Cadillac had left the scene moments before the explosion, Patrolman Arnstein's earlier observation of a white Cadillac and a man fitting appellant's description at the tavern, the fact that appellant owned a white Cadillac, which was parked at his home the day after the bombing, and the fact that appellant owned the bombed tavern. Perhaps the most important fact was the statement that the white Cadillac had left the scene "moments" before the explosion. This permitted the issuing judge to conclude that whoever was driving the car heard the explosion but did not return. Since the relative uniqueness of white Cadillacs and the earlier evidence of defendant's presence justify a conclusion that it was defendant who was driving away, the judge could further have drawn the inference of complicity from a failure to do what defendant, if innocent, would have done, i.e., returned to check on his premises after hearing the explosion. If the issuing judge was entitled to credit all of this information, we think it provided him with an adequate foundation to regard appellant as a prime suspect, quite apart from whether it would have provided probable cause for appellant's arrest.

Appellant, however, challenges the use of the statement of the "unknown male," a crucial piece of evidence in the chain implicating appellant, in establishing probable cause for the search. Appellant argues that the statement of the "unknown male" should be treated as an informant's tip and not credited because the police have not demonstrated his credibility and the reliability of his statement, as required by *Aguilar* v. *Texas*, 378 U.S. 108 (1964), and *Spinelli* v. *United States*, 393 U.S. 410 (1969). *See also United States* v. *Harris*, 403 U.S. 573 (1971). We do not, however,

regard the "unknown male's" statement as an informant's tip subject to *Aguilar* and *Spinelli*. We view it instead as the statement of a bystander witness. While the affidavit does not expressly disclose the source of the "unknown male's" information, the nature of the information he provided and the circumstances of his "on the scene" report could strongly suggest to the issuing judge that he was relating what he had personally observed. And, his statement was not at all in the nature of an informant's tip — it was non-accusatory and did not describe criminal activity. He merely stated that a white Cadillac had left the scene moments before the explosion, a detail innocuous by itself. Its significance lay in its fitting in with other facts which such a bystander would presumably not know. To be sure, it would have been preferable for the affidavit to have identified the "unknown male" and to have specified whether he had personally observed the Cadillac leave the scene. But we must interpret the affidavit "in a commonsense and realistic fashion," eschewing "[a] grudging or negative attitude" and recognizing that affidavits for search warrants "are normally drafted by nonlawyers in the midst and haste of a criminal investigation." *United States* v. *Ventresca*, 380 U.S. 102, 108 (1965). From that perspective, the reasonable implication of the affidavit is that the "unknown male" was a bystander witness, not an informant. Treating him as such — and taking into account that the statement, which formed a single link in a circumstantial chain, was non-accusatory— we think the demonstration of credibility and reliability that would be required under *Aguilar* and *Spinelli* in the case of an informant is not required here. As the Second Circuit noted in *United States* v. *Burke*, 517 F.2d 377, 380 (2d Cir. 1975) (Friendly, J.),

> "there has been a growing recognition that the language in *Aguilar* and *Spinelli* was addressed to the

> particular problem of professional informers and should not be applied in a wooden fashion to cases where the information comes from an alleged victim of or witness to a crime."

Accord, e.g., United States v. *Bell,* 457 F.2d 1231, 1238-39 (5th Cir. 1972); *United States* v. *Mahler,* 442 F.2d 1172, 1174-75 (9th Cir.), *cert. denied,* 404 U.S. 993 (1971); *United States* v. *McCoy,* 478 F.2d 176, 179 (10th Cir.), *cert. denied,* 414 U.S. 828 (1973). The considerations that produced the *Aguilar* and *Spinelli* formulation in the case of an informant do not all apply in the eyewitness situation. *United States* v. *Bell,* 457 F.2d at 1238-39.

While the precise requirements of *Aguilar* and *Spinelli* need not be met in this situation, it is still necessary that the issuing judge have had a "substantial basis" for crediting the hearsay. *See United States* v. *Burke,* 517 F.2d at 381. *See generally United States* v. *Harris,* 403 U.S. at 581; *Jones* v. *United States,* 362 U.S. 257, 271-72 (1960). That the "unknown male" was not identified and that the affidavit did not state the circumstances of his observation might be grounds for discounting the statement had it stood alone. However, we think the corroboration provided by Patrolman Arnstein's observation of a white Cadillac at the tavern earlier in the morning afforded a sound basis for crediting the remark. We accordingly agree with the district court that the affidavit's hearsay report of the "unknown male's" statement could contribute to the probable cause basis of the search warrant. *See Jones* v. *United States,* 362 U.S. at 271; Fed. R. Crim. P. 41(c).

The facts recited in the affidavit thus strongly pointed to appellant as having played some role in the bombing. To justify the warrant authorizing the search of his house, the affidavit must also have provided a reasonable basis to believe that the instrumentalities of the crime sought

by the police — wires, blasting caps, dynamite, crimping pliers and other tools applicable to the making of a bomb — might be found there. The affidavit stated in this regard only that the bomb squad officers believed that the type of bomb used at the tavern "would generally be assembled in a workshop of some sort, as opposed to in the vehicle, because of the type of tools and materials needed to assemble the bomb." Appellant claims that that supposition does not create a reasonable basis for believing that the instrumentalities sought were present in appellant's home.

While the question is a close one, we believe it was permissible for the issuing judge to infer that evidence or instrumentalities might be found in appellant's home. We note particularly the abundance of wire (103 feet outside the tavern), the location of some of it inside the tavern, and the home-made nature of the device. The defendant, who could have been thought to have known precisely when the explosion was to occur, was the only person so far known to have had a possible connection with the bomb. Since a place to assemble it other than a car, or out of doors, was indicated, this would suggest two places — the tavern and defendant's home. While we are urged to accept the tavern as equally probable, we think the tavern a particularly unlikely place for the clandestine assembling of a bomb, given the wide-ranging authority of officers to inspect premises of dealers in liquor with or without warrant, *United States* v. *Biswell*, 406 U.S. 311, 314 (1972). This is a business with "a long tradition of close government supervision, of which any person who chooses to enter . . . must already be aware." *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 313 (1978). Under these circumstances, defendant's house emerges as the likely location having a connection with him. Furthermore, it was reasonable to assume that if the bomb had been assembled in the house, given the large quantity of wire, the traces of bomb-making

activity sought would still be present when the warrant was issued and executed the day after the explosion. Reasonable inferences of this nature are sufficient to justify the search warrant. *See United States* v. *Samson*, 533 F.2d 721, 723 (1st Cir.), *cert. denied*, 429 U.S. 845 (1976); *cf. United States* v. *Picariello*, 568 F.2d 222, 224-27 (1st Cir. 1978); *Haefeli* v. *Chernoff*, 526 F.2d 1314, 1318-19 (1st Cir. 1975); *United States* v. *Lucarz*, 430 F.2d 1051, 1055 (9th Cir. 1970). *But cf. United States* v. *Flanagan*, 423 F.2d 745 (5th Cir. 1970).

Accordingly, giving due weight to the finding of probable cause by the state judge who issued the warrant in this close case, *see United States* v. *Ventresca*, 380 U.S. at 109, we think that the warrant had an adequate probable cause basis.

II.

Appellant argues next that Detective Lydstone's affidavit contained material misrepresentations and omissions in reckless disregard for the truth, and that therefore the search warrant should have been voided and the seized firearms excluded from evidence under *Franks* v. *Delaware*, 46 U.S.L.W. 4869 (June 26, 1978). In *Franks* the Supreme Court ruled,

> "where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the

> affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit."

46 U.S.L.W. at 4870. The district court held an evidentiary hearing on appellant's challenges to the truthfulness of the affidavit and found them to lack merit. We are not persuaded that the court erred.

The veracity challenges appellant makes are to the affidavit's statement that "[u]pon [Patrolman Arnstein's] arrival and during his investigation, an unknown male stated that a white Cadillac had left the scene moments before the explosion." This is all the affidavit said regarding what the witness had reported seeing. Appellant challenges the veracity of this statement in three respects. Appellant first claims that the stated timing of the car's departure, "moments before the explosion," was a material misrepresentation of what the witness had reported. It is true that at the district court's hearing on the motion to suppress, both Arnstein and Lydstone testified that the witness had in fact not stated just when he had seen the car leave. But, both officers consistently maintained that the witness had reported seeing the car in the area just prior to the explosion and seeing it leave at some unspecified point. Since the witness reported this to Arnstein just after the explosion, the inference is clear that the witness saw the car leave either moments before, at the time of, or moments after the explosion. Within this narrow range, it is difficult to discern how the precise timing of the car's departure from the scene of the explosion would have made any difference to the issuing judge's determination of probable cause. The affidavit's inaccuracy, if any, in this regard was therefore immaterial.

Appellant claims further that it was a material omission for the affidavit to identify the witness as an "unknown male." The evidence supports the district court's finding, however, that the only information the police had about the witness at the time the affidavit was submitted was that he was known by the nickname "Arky" and that he was associated with the Circle Cafe, an establishment located close to Rooney's Tavern. While it would have been preferable for Lydstone to have included even this sketchy information in the affidavit to indicate that the witness was not a phantom stranger in the night, its usefulness to the issuing judge seems slight. The district court, in any event, found the information was not excluded intentionally or in reckless disregard for the truth, and we cannot say that the court was clearly erroneous.

Lastly, appellant contends that the affidavit was flawed for not disclosing statements made by "Arky" to Detective Coleman in a telephone conversation the day after the explosion. The conversation, evidently took place when Coleman and Lydstone went to the Circle Cafe to inquire about "Arky," and were told he was not there but would talk to them by telephone. Coleman reported that during the conversation "Arky" said he had just been joking when he talked to Patrolman Arnstein the night before and that while he had seen a white car parked behind Rooney's Tavern he could not identify the car's make. "Arky" at the same time told Coleman that he had received threats and that he wanted to forget the whole matter, and Coleman sensed that "Arky" was nervous and upset. Detective Lydstone did not mention this conversation in the affidavit for the warrant. The reason he gave for its exclusion was his view that the conversation was irrelevant. The district court, believing that Lydstone genuinely viewed the conversation as irrelevant, found that the failure of the affidavit to mention it was not a deliberate falsification

or a reckless disregard for the truth under *Franks* v. *Delaware*.[2] That was a permissible conclusion on the record. The apparent reason why Lydstone discounted the statements made by "Arky" to Coleman was that his purported recantation of his statement to Arnstein lacked credibility and reasonably seemed to be prompted by the threats he had been receiving. Coleman inferred that the threats related to "Arky's" role as a witness and understandably concluded that he was upset thereby. We do not approve the affidavit's failure to reveal the conversation; whether "Arky's" recantation was unbelievable was properly for the issuing judge, not the police, to decide. Detective Lydstone should have reported the conversation in his affidavit, and it was negligent for him not to have done so. But his failure was even-handed, omitting not only the extent to which "Arky" had changed his story but the fact that he had received threats. We therefore again hold that the district court was not cleary erroneous in finding that the police were not so culpable as to warrant relief.

III.

Appellant argues lastly that the sawed-off shotgun and sawed-off carbine seized during the search of his home were the fruits of statements obtained from him by the police in violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and therefore should have been excluded from

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[2] The two challenges to the veracity of the affidavit discussed above were decided by the district court prior to the Supreme Court's decision in *Franks* v. *Delaware*, 46 U.S.L.W. 4869 (June 26, 1978). The court was guided by our opinion in *United States* v. *Belculfine*, 508 F.2d 58 (1st Cir. 1974), however, and clearly understood that an affidavit's intentional or reckless false statement, if necessary to the finding of probable cause, would invalidate a search warrant. There is no reason to believe the district court would have reached any different result after *Franks* v. *Delaware*. *See also United States* v. *Cruz*, No. 78-1146 (1st Cir. March 9, 1979).

evidence. The statements were elicited during the search pursuant to the warrant. Upon beginning the search, a police officer asked appellant whether any money or firearms were in the house. These apparently are routine questions asked for the purpose of protecting the searching officers from violence or accusations of theft. Appellant answered that he did have firearms in the house. The police officer then asked appellant whether he had a Firearms Identification Card or a license to possess the firearms, and appellant answered that he did not. This conversation took place prior to any *Miranda* warnings being given to appellant.

We need not decide under the circumstances whether these questions constituted a custodial interrogation in which appellant was entitled to *Miranda* warnings. Even if we assume that the warnings were required, there is ample evidence supporting the district court's finding below that the firearms were not the fruits of appellant's statements but were obtained "by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun* v. *United States*, 371 U.S. 471, 488 (1963). Indeed, the district court found that the discovery of the firearms was "wholly unrelated" to appellant's statements regarding the firearms. Police officers had already started their search of the cellar, where the firearms were discovered, before appellant's statements were made. In their search for the implements used in the bombing, the police officers certainly would have uncovered the firearms regardless of appellant's statements. Appellant evidently did not lead the officers to the weapons, and one of them was found in a duffel bag beneath a workbench. As the firearms were discovered by a means wholly independent of the alleged primary illegality, no purpose underlying the exclusionary rule would be served by suppressing the firearms which were found during the otherwise lawful

search. *Virgin Islands* v. *Gereau*, 502 F.2d 914, 926-28 (3d Cir. 1974), *cert. denied*, 420 U.S. 909 (1975); *United States* v. *Falley*, 489 F.2d 33, 40-41 (2d Cir. 1973).

Appellant's statements that the weapons were unregistered were not necessary to give the police officers probable cause to seize the weapons once they were discovered. The very nature of the objects — a sawed-off shotgun and a sawed-off carbine — provided probable cause to believe the firearms were contraband. The Second Circuit has explained,

> "While it is possible for a person to register and therefore possess legally a sawed-off shotgun or an automatic weapon, it is not a prerequisite for a legal seizure that the officers know at the time of the search that the seized weapons were not registered. United States v. Story, 463 F.2d 326, 328 (8th Cir.), cert. denied, 409 U.S. 988, 93 S.Ct. 343, 34 L.Ed.2d 254 (1972); United States v. Cecil, 457 F.2d 1178, 1180-81 (8th Cir. 1972); United States v. Zeidman, 444 F.2d 1051, 1054 (7th Cir. 1971); United States v. Ciaccio, 356 F.Supp. 1373, 1378 (D.Md. 1972).[7]
>
> "As the Ninth Circuit noted in Porter v. United States, 335 F.2d 602, 607 (1964), cert. denied, 379 U.S. 983, 85 S.Ct. 695, 13 L.Ed.2d 574 (1965), 'a sawed-off shotgun in private hands is not an intrinsically innocent object. The possession of it is a serious crime, except under extraordinary circumstances.' In 1972, there were less than 15,000 registered sawed-off shotguns in the United States, most of which were regi-

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"[7] As the Eighth Circuit noted in *Cecil*, '[w]e know of no rule which requires an officer to have knowledge of all the elements of the crime when he views an article which reasonably appears to be contraband. A requirement that an officer must know the fact of nonregistration before seizing a contraband firearm would stultify the enforcement of the National Firearms Act.' 457 F.2d at 1180."

stered to governmental agencies for training purposes or to residents of Western states. United States v. Cecil, *supra*, 457 F.2d at 1182 n.1 (Heaney, J., dissenting)."

United States v. *Canestri*, 518 F.2d 269, 274-75 (2d Cir. 1975). In addition, here the sawed-off shotgun was found concealed in a duffel bag beneath a workbench in appellant's cellar, reinforcing the suspicion that it was illegally possessed. Accordingly, the district court correctly concluded that the firearms were not seized as a "fruit of the poisonous tree."

Affirmed.

BOWNES, *Circuit Judge* (dissenting). The warrants which were issued for the search of defendant Melvin's home and car were fatally defective in that no adequate showing of probable cause was made. The affidavit upon which the warrants were premised was facially insufficient[1] to meet the fourth amendment's requirement that "no Warrants shall issue, but upon probable cause. . . ."

The facts we are presented with are skimpy indeed. At approximately 2:00 A.M. a man was seen in front of Rooney's Tavern.[1a] A white Cadillac was parked outside in front. At 3:55 A.M. an explosion ripped through the tavern. According to the affidavit of a police officer who was not present at the time, an "unknown male" had said that a white Cadillac had left the scene moments before the explosion. James Melvin, defendant, at that time owned

[1] I discuss, *infra*, some of the subfacial problems of the affidavit.

[1a] At the suppression hearing, Officer Arnstein stated that, while he thought Rooney's had only a 1:00 A.M. license, it still appeared to be open at 2:00 A.M. with several people inside.

a white Cadillac. He was part owner of the tavern and lived in another town, Weymouth. Leg wires were found outside the back of the building leading inside, thus suggesting that it had been bombed. Two officers of the bomb squad said they thought the bomb which caused the explosion would generally be made in a workshop of some sort. The patrol officer, when shown a photo of defendant, said that the man he had noticed at 2:00 A.M. bore a "strong resemblance" to the picture of defendant. On the basis of these facts — which were all that were before the justice issuing the warrants — a search warrant for defendant's car and another warrant to search his home were obtained.

Even reading the affidavit, which is reproduced in its entirety in the margin,[2] in the most generous light, *United*

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[2] The affidavit is here reproduced in its entirety:

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT

AFFIDAVIT

I, JOHN E. LYDSTONE, a detective in the Boston Police Department, assigned to the Intelligence Division, Vice Control Section, being duly sworn, state:

(1) That I have been a police officer in the City of Boston for the past ten years and for the last three years assigned to the Intelligence Division, Vice Control Section. During that time as a detective in the Intelligence Division, it has been my assignment in part, to investigate organized criminal activity in and around the City of Boston.

(2) That about 9:30 AM on Thursday, November 18, 1976 I and other officers from the Intelligence Division had occasion to respond to 417 Neponset Avenue, Dorchester, which is Rooney's Tavern, on report that an explosion had taken place there. Upon arrival and after conversing with members of the Boston Fire Department Arson Squad who were already on the scene, I notified the Boston Police Emergency Service Unit, Bomb Squad and requested them to conduct an investigation.

(3) Boston Police Sergeant Ruglario and Patrolman Cunningham of the Bomb Squad responded and conducted an investigation and reported the following facts to me: a length of brown wire was found at the rear of Rooney's Tavern, partially concealed in the grass. This wire was about one hundred and three feet in length with the insulation stripped at both ends and extended

States v. *Ventresca*, 380 U.S. 102, 108-09 (1965), the affidavit does not support a finding of probable cause necessary to underpin the warrants. Neither the facts therein recited nor the inferences reasonably drawn therefrom supports a finding of a probable cause.

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from the rear of the Tavern to the sidewalk along Cradick Street. It is the opinion of the Bomb Squad officers that this wire is capable of and consistent with the type used to explode a bomb. The officers further reported that inside of the tavern a length of similar brown wire was found. Attached to the end of this wire was a piece of yellow wire and a piece of blue wire which is consistent with the kind used to detonate a blasting cap which would detonate a stick of dynamite. It is the opinion of these bomb squad officers that the above paraphernalia was in facts [*sic*] used to cause the explosion at Rooney's Tavern.

(4) That at about 6:00 PM on Thursday, November 18, 1976, I and other officers of the Intelligence Division interviewed Patrolman John Arnstein of Boston Police District 11. Patrolman Arnstein stated that at about 2:00 AM on Thursday, November 18, 1976, he had been on duty and patrolling the area of Rooney's Tavern and noted that a white Cadillac was parked at the front door and that a white male, about 35 years, 5-10, 180 lbs. was standing at the front door. Later that same morning, at about 3:56 AM, Patrolman Arnstein responded to a radio call relative to an explosion at Rooney's Tavern. Unon [*sic*] and during his investigation, an unknown male stated that a white Cadillac had left the scene moments before the explosion.

(5) That I gave photographs of persons known by me to frequent the area of Rooney's Tavern and Patrolman Arnstein indicated that a photograph of James Melvin bore a strong resemblance to the man that he had seen at the Tavern door at 2:00 AM that morning.

(6) That James Melvin is a white male, 34 years old 5'9" 165 lbs., is listed as an owner of Rooney's Tavern and that he operates a 1976 Cadillac, color white, Mass. Reg. D66-105 and he resides at 38 Ells Ave., Weymouth.

(7) That at about 10:00 PM Thursday, November 18, 1976, Detective Martin Coleman of the Intelligence Division responded to 38 Ells Aven., Weymouth and observed that the white Cadillac belonging to Melvin was parked at that location.

(8) That I have discussed the above stated facts and their inferences with other members of the Intelligence Division and it is our collective opinion that there is probable cause to believe that James F. Melvin was responsible for the explosion at Rooney's Tavern and respectfully request that the Court issue search warrant for Melvin's white Cadillac, Mass. Reg. D66-105.

In its skeletonized form, the information presented in the affidavit[3] was that a white Cadillac and a man who resembled defendant were seen in front of the tavern at 2:00 A.M.,[4] that defendant owned a white Cadillac, and that an "unknown male"[5] had stated that a white Cadillac

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(9) I have discussed the facts and inferences of this case with Sgt. Ruglario and and [*sic*] Patrolman Cunningham of the Bomb Squad. They inform me that the type of device capable of causing the above damage (at Rooney's Tavern) would generally be assembled in a workshop of some sort, as opposed to in the vehicle, because of the type of tools and materials needed to assemble the bomb. Therefore, I also request a search warrant for James Melvin's residence at 38 Ells Avenue, Weymouth, Massachusetts. That residence is described as a single-family, brown, two-story house with a garage attached.

Respectfully submitted,
John E. Lydstone

JOHN E. LYDSTONE
Detective
Boston Police Department

[3] There is no contention that information other than that in the affidavit was presented to the justice who issued the warrants. Any finding of probable cause must, therefore, be found in the affidavit. *Spinelli* v. *United States*, 393 U.S. 410, 413 n.3 (1969); *Aguilar* v. *Texas*, 378 U.S. 108, 109 n.1 (1964); *Giordenello* v. *United States*, 357 U.S. 480, 486 (1958).

[4] This fact in and of itself imputes no wrongdoing. Even if the bar had a closing time of 1:00 A.M., it is not unreasonable that the owner should come to the premises an hour later, perhaps to check receipts for the evening, close the bar for the night, check to make sure that everything had run smoothly. In short, neither the fact, nor any reasonable inference therefrom, that a man strongly resembling defendant had been seen in front of the tavern at 2:00 A.M. is suggestive of criminal liability.

[5] The "unknown male" was the owner of a nearby bar and was known to the police at the scene of the explosion as Arky. As Arky was approaching the throng of police, he asked Officer Arnstein, "Am I a prime suspect in this?". His query was made in a joking manner according to his deposition testimony. There is nothing in the record before us to suggest that he was in any way involved in the explosion. I note the remark simply for the tint it casts over the question of his credibility as a witness.

had left the tavern shortly before the explosion at 3:55 A.M.[6]

To uphold a search of defendant's home on the basis of the affidavit here is a brazen intrusion upon historic fourth amendment rights. A man who resembled defendant was observed entering his own establishment, a car of the same make as that owned by defendant[7] was later observed shortly before the explosion. Two bomb experts

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[6] From these facts, a jump is made that probable cause existed to search defendant's car. The search of defendant's car is not the focus of attention here since the guns which formed the basis of the indictment and conviction were found in the house, not the car. Since, however, the car forms a necessary step on the road to finding probable cause to search the house, I briefly consider it. On the basis of the facts contained in the affidavit, I think that no warrant should have issued for a search of the car. I reach this conclusion recognizing full well that automobiles have been accorded special treatment by the Supreme Court for fourth amendment purposes. An exception to the warrant requirement has been formulated for searches of automobiles under certain circumstances. The rationale has been articulated in terms of the unique status automobiles enjoy in our society, with their inherent mobility and relatively fewer expectations of privacy associated with them. *See, e.g., United States* v. *Chadwick*, 433 U.S. 1 (1977); *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 561 (1976); *Cardwell* v. *Lewis*, 417 U.S. 583, 590 (1974) (plurality opinion); *Chambers* v. *Maroney*, 399 U.S. 42 (1970); *Carroll* v. *United States*, 267 U.S. 132 (1925). Nonetheless, there is a bedrock upon which any such search must rest: probable cause. "[T]he *Carroll* doctrine does not declare a field day for the police in searching automobiles. Automobile or no automobile, there must be probable cause for the search." *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 269 (1973) (footnote omitted). *Cf. Delaware* v. *Prouse*, 47 U.S.L.W. 4323 (Mar. 27, 1979) (either probable cause or articulable reasonable suspicion necessary for spot checks of automobiles). Here, there was no information in the affidavit concerning the year of the Cadillac seen at 2:00 A.M. and the one seen later. No license plate numbers were obtained, to check against whether the car purportedly seen at 3:55 A.M. bore tags registered to defendant, no year or model of the Cadillacs was included, matching either the 2:00 A.M. car with the 3:55 A.M. one or matching either vehicle with the one owned by defendant. In short, I find no clearly identifying information linking the cars seen with that owned by defendant.

[7] I do not believe, as the majority suggests — nor is there anything in the record to support a finding — that white Cadillacs are "relative[ly] unique[]" in Boston. In a city the size of Boston, Cadillacs — even white ones — are not an endangered species.

concluded that the explosive was probably built in a workshop. In boiled down format, this was the basis upon which the warrant issued. I cannot believe the constitution's requirement for a finding of probable cause can be satisfied on these facts.

There is a disturbing circularity to the majority's argumentation. It proceeds on inferences to find it reasonable to suspect defendant of having bombed the tavern and then assumes that the tools for the bomb making are likely to be found at his residence. The defendant's white Cadillac, on this bootstrap merry-go-round, becomes the key that opens his home to a search and seizure.

The affidavit contains the assertion that it is the "collective opinion" of the police that there is probable cause to believe defendant was responsible for the explosion. That this conclusory statement could not — at least in my understanding — support an arrest warrant (and I find it interesting that no arrest warrant was ever sought by police despite their collective opinion that there was probable cause) is beyond peradventure. It is, however, the necessary building block in the affidavit's construct since, from this, the affidavit skips to the fact that two members of the bomb squad ventured their opinion that the bomb which caused the explosion would "generally be assembled in a workshop of some sort." On this basis — the collective opinion by the police that defendant was responsible and the opinion of two bomb experts that a workshop of some sort might have been used in making the explosive — a warrant to search defendant's home was obtained. This eviscerates the fourth amendment's mandate that no warrant issue except on probable cause.

We are asked to link inference to inference until the final chain of probable cause is forged. The first set of inferences culminated in the conclusion that it was reasonable to assume that defendant had played a role in the bombing. Next,

we are told that it was reasonable to believe that the bomb would have been constructed in a workshop of some sort. From there, the inference is that the bomb was a homemade device which the person responsible would have built himself. Since we have already inferred that defendant was probably responsible — so the argument goes — it then becomes reasonable to suspect that he built the bomb and that his home, which lies in another town (though we are assured, is not too distant from the tavern) would have been the locus of the bomb making activity. Finally, we are faced with the linchpin that *if* the bomb had been assembled in the house, the traces of bombmaking would still be present.[8]

I reiterate what this court said on an earlier occasion:

> It is one thing to expect the magistrate to give a commonsense reading to facts set forth and to draw inferences from them. It is quite another thing to expect the magistrate to reach for external facts and to build inference upon inference in order to create a reasonable basis for his belief[.]

Rosencranz v. *United States*, 356 F.2d 310, 317 (1st Cir. 1966).

There must be a "substantial basis" for the magistrate or justice to conclude that evidence of the crime would be found at defendant's home. *Aguilar* v. *Texas*, 378 U.S. 108, 111 (1964), quoting *Jones* v. *United States*, 362 U.S. 257, 271 (1960). "Facts or circumstances" from which the justice can find probable cause must be presented. *Nath-*

[8] No traces of bombmaking were found in defendant's house, though some evidence was found in the car. Instead, the police uncovered a veritable arsenal of dangerous and highly suspicious weapons and ammunition. Seven guns were seized, including sawed-off weapons. A cache of ammunition, including armor piercing bullets, was taken by the police. The munitions are highly suggestive, of course, of criminal behavior. Their discovery cannot, however, justify *post facto* the illegal search, initiated without probable cause.

anson v. *United States,* 290 U.S. 41, 47 (1933). Here, no such basis was present. No facts or circumstances were described which would have permitted the justice to conclude that evidence of the bombmaking would likely be found at the home. There was no allegation that more than one bomb was constructed, *compare United States* v. *Picariello,* 568 F.2d 222, 224-26 (1st Cir. 1978); there was no statement that defendant had a workshop in his home; no one reported seeing any such bomb making implements at the home, *compare United States* v. *Burke,* 517 F.2d 377, 379 (2d Cir. 1975); no one had personally witnessed defendant making such a bomb, *compare United States* v. *Harris,* 403 U.S. 573, 579 (1971); the affidavit claimed no direct knowledge of explosive making material at defendant's home, *compare Jones* v. *United States,* 362 U.S. 257, 268 (1960).

The cases cited by the government and relied upon by the majority are clearly distinguishable. In *United States* v. *Samson,* 533 F.2d 721 (1st Cir.), *cert. denied,* 429 U.S. 845 (1976), there was a recitation of specific facts by the informant who had been directly involved in the criminal activity; there was no question about defendant's involvement in the purported illegality. The informant also stated that defendant, who had illegally brought guns to the informant's apartment for sale, then brought the guns back to his own apartment as far as the informant knew.

Haefeli v. *Chernoff,* 526 F.2d 1314 (1st Cir. 1975), upheld a warrant to search defendant's apartment following his arrest for possession of stolen property and after other evidence and fruits of criminal activity had been seized from a search of his car. Other known pieces of property which had been stolen during the burglary were still missing. On these grounds, as well as evidence which had been gathered as the result of surveillance and general identification

of defendant by other victims, we found the search warrant validly issued.

In *United States* v. *Lucarz*, 430 F.2d 1051 (9th Cir. 1970), defendant mail clerk had signed for a registered pouch containing $29,000; several hours later, he reported the pouch stolen. Defendant was seen leaving the post office and returning approximately thirty-five minutes later, time enough for him to have gone to his home and returned. Shortly thereafter, he reported the pouch missing. The affidavit contained detailed descriptions of his movements, as well as glaring discrepancies in the story he told his supervisor and others. His own version was internally inconsistent.

United States v. *Picariello, supra*, 568 F.2d 222, is clearly not apposite. There, over 1,200 pounds of explosives had been stolen and only a small portion recovered; defendant had been under surveillance for two months prior to the search, following tentative witness identification of defendant as a participant in a bombing incident. Defendant was observed by agents leaving his house carrying a box and an attache case, entering a car which was tailed by police, then which was engaged in a high speed chase with police, and was found abandoned hours later with fifty sticks of the stolen dynamite in it.

Here, by contrast, we have no eyewitness or participant to the alleged illegality; we have no positive identification of defendant as directly involved in the explosion; there was no valid arrest and simultaneous discovery of part of the incriminating material; there was no showing that defendant had ever possessed explosives; there was no suggestion that more than one bomb had been manufactured; there were no grounds for a reasonable belief that additional explosive making material was extant or would be found at defendant's home.

For a series of cases which have held that no probable cause existed to search defendant's home, even *after* defendant had been lawfully arrested (here, there is not even this to suggest a permissible link for a search of defendant's house), *see, e.g., United States* v. *Gramlich*, 551 F.2d 1359, 1362 (5th Cir. 1977) (no circumstance upon which magistrate could base his determination that incriminating evidence would be found in defendant's home; search invalid); *United States* v. *Bailey*, 458 F.2d 408 (9th Cir. 1972) (nothing in the affidavits to support affiant's conclusion that fruits of the crime might be in either the house or car; search invalid); *United States* v. *Flanagan*, 423 F.2d 745 (5th Cir. 1970) (affidavit merely raises the suspicion that goods would be found in the home sought to be searched; search invalid).

The affidavit here presented "no more than an anemic suspicion," *United States* v. *Whitlow*, 339 F.2d 975, 980 (7th Cir. 1964), that evidence of bomb making would be found at defendant's home. No adequate foundation for a finding of probable cause was laid and the resulting warrant was, therefore, illegally issued.

I am also troubled by the implications of the majority's comments regarding the degree of certitude required for a finding of probable cause. *Ante* at 5. The majority states that probable cause is properly defined as reasonable cause and cites to *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978), and *Brinegar* v. *United States*, 338 U.S. 160, 175-76 (1949). The focus of the discussion in *Zurcher* was whether the premises of a third party, not implicated in criminal wrongdoing, could lawfully be the subject of a search warrant when there was probable cause to believe evidence of a crime could be found there. The majority, by focusing narrowly on language relating to "reasonableness," compels the inference that the degree of probity required for probable cause to obtain a search warrant is somehow of

a lesser calibre than other forms of probable cause. This is patently incorrect. Probable cause for a search warrant requires the same degree of certitude as probable cause to arrest.[9] *Zurcher* at 556-57 n.6; *Spinelli* v. *United States*, 393 U.S. 410, 417 n.5 (1969); *Aguilar* v. *Texas*, 378 U.S. 108, 112 n.3 (1964); *Giordenello* v. *United States*, 357 U.S. 480, 485-86 (1958); *Ex Parte Burford*, 7 U.S. (3 Cranch) 448, 451 (1806). While that degree need not be calibrated according to mathematical formula, the strong showing which must be made cannot be ignored.

In reviewing the affidavit for probable cause, my brethren analyze the information provided by the "unknown male" and discuss the distinction which has been drawn by some courts between crediting information which comes via an informant and that from a bystander witness. According to the distinction, the latter is not subject to the precise requirements of *Aguilar* v. *Texas*, *supra*, 378 U.S. 108, and *Spinelli* v. *United States*, *supra*, 393 U.S. 410. However, the cases cited by the majority in support of the application of this principle to the instant case do not aid the affidavit here relied on. In *United States* v. *Burke*, *supra*, 517 F.2d 377, the eyewitness had actually seen the illegal gun in the place to be searched, there was particularity of detail, and the witness was named. In *United States* v. *McCoy*, 478 F.2d 176 (10th Cir.), *cert. denied*,

[9] Relaxation of this standard has been condoned in a few specifically recognized exceptions, *i.e.*, routine searches which occur at our national borders and their functional equivalents and which involve no more than a visual inspection of occupants and contents visible from the outside, *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976); *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975); searches of luggage at the border; "stop and frisk" limited searches for weapons under *Terry* v. *Ohio*, 392 U.S. 1 (1968). In these limited cases, the personal interest protected by the fourth amendment has been weighed against the public interest in the search and the intrusion has been found to be reasonable.

414 U.S. 828 (1973), eyewitnesses aboard a skyjacked plane gave detailed information concerning defendant; the F.B.I. laboratory in Washington matched the handwriting on the demand note to defendant's Army personnel records; there were several other corroborating details, all directly linking defendant with the crime. In *United States* v. *Bell*, 457 F.2d 1231 (5th Cir. 1972), there was positive identification by witnesses of defendant, there were several corroborating witnesses. In *United States* v. *Mahler*, 442 F.2d 1172 (9th Cir.), *cert. denied*, 404 U.S. 993 (1971), there was a self-corroborating aspect to the information transmittted since the informant had been the victim of defendant's extortion scheme.

The important point these cases make is that an affidavit does not fail merely because it relies on hearsay evidence of a bystander to establish probable cause. So long as the hearsay evidence includes indicia of credibility and internal reliability, it poses no problem. The problem arises when, in a case such as that presented here, there is no method for ascertaining the truth or accuracy of the bystander's comments. He was listed solely as an unidentified male; there was no statement that he himself had seen the car leave the scene of the explosion;[10] there were no other witnesses who could place the car at the scene moments before the explosion. On this last point, I think it important to say that, unlike my brethren, I do not consider the patrol officer's observation of a white Cadillac two hours earlier as corroborating evidence that a white Cadillac was seen shortly before the explosion. The unidentified male had not seen defendant or anyone else at the tavern,

[10] In fact, we know now that he never said that he had seen the car leave the scene shortly before the explosion. We further know that he was not at the site when the explosion ocurred, but had left fifteen to thirty minutes earlier and was at his home and was called by an employee whose house faces Rooney's Tavern. Arky then drove from his house back to the area.

so there was no positive identification unlike the cases cited above. There was no self-corroborating aspect to Arky's comment, since he had been neither the victim nor accomplice of the alleged illegality. In short, there is lacking the type of firm and concrete detail shown in the witnesses' statements in the cases relied on by the government and the majority. I have no quarrel with the principle that the *Aguilar/Spinelli* analysis might need adaptation where the informant is a witness or bystander rather than a professional informer. What I think is necessary, however, is a recognition that the focus should not be on drawing this distinction, but rather on whether the information transmitted is credible and contains sufficient indices of credibility for a neutral magistrate to be able to justifiably rely on it in finding probable cause.

There are other troubling aspects to this case which raise grave questions. The most serious of these concerns the subfacial problems of the affidavit. Since I believe the affidavit failed on its face to make a showing sufficient to find probable cause, I do not reach the questions raised by defendant concerning the subfacial irregularities of the affidavit, but their mere recitation is unsettling: the failure of the police to disclose that the informant Arky (1) recanted on his identification of the car as a "white Cadillac," (2) may never have identified the car as a white Cadillac, (3) never said that he had seen the car leave the scene of the incident "moments before the explosion," (4) was not an "unidentified male" since he was known at least by the nickname Arky and was known to have at least a managerial (in fact he was the owner) interest in a nearby competing bar, the Circle Cafe.[11] The

[11] The district court, pursuant to *United States* v. *Belculfine*, 508 F.2d 58 (1st Cir. 1974), *see also Franks* v. *Delaware*, 438 U.S. 154 (1978), held an evidentiary hearing and determined that suppression would not be required for the asserted flaws in the affidavit, ruling that they did not constitute material omissions or misstatements made either intentionally or recklessly.

majority excuses these failures by noting that the lapses by the police were "even-handed" since they also failed to report that Arky had purportedly received threatening calls. There might be a balancing of the scales were the recantation weighed against the threats. However, the fact that Arky never said that he saw the car "moments before" the explosion, that he never said that he saw the car leaving the scene, and that he, himself, was not even at the scene at the time of the explosion, tips the scale heavily against a conclusion of even-handedness.

The court below also forgave these flaws, on the grounds that the affidavit was prepared in haste because of "evolving and ambiguous circumstances[.]" Although the talisman of time pressure and haste is invoked, I do not succumb to its spell. The police sought the warrant at 5:30 P.M. on November 19, a full 37½ hours after the explosion. This is not the situation of *United States* v. *Cruz Pagan*, 537 F.2d 554 (1st Cir. 1976), cited below, where the setting was indeed one of a series of rapid-fire events: a plane landed without authority, a car was observed speeding away from the air field abandoning the aircraft. The errors in the affidavit there were minimal and were based on direct observation by the police. Here, the police waited a day and a half before seeking the warrant, during which time little or no effort was made to flesh out the factual details surrounding the explosion. The police *did* interview Arky, by phone. Notwithstanding this, the affidavit still referred to him as "an unidentified male." Even more alarming is the failure of the police to recount Arky's recantation, during that conversation, of his comments of the previous day. This is not the proper setting for applying the rubric of quickly occurring events as an excuse for slight discrepancies or omissions in an affidavit. Everything that was to happen had already occurred. All that remained was for the police to do proper investi-

gative work so that they could lay the basis for a neutral justice to conclude that probable cause existed to search defendant's car and home. This, the police did not do. In fact, the only investigative work which was done resulted in a recantation which the police suppressed from the affidavit.

The protection afforded by the fourth amendment stands as an important bulwark for people in a free society. Unreasonable searches, made without probable cause, threaten the very fabric of our democratic system. The search here was executed in the absence of probable cause. I think nothing is clearer in our jurisprudence than that the fruits of that search should be suppressed. I fear that by upholding the constitutionality of the search here, the majority's opinion will be read as an open invitation to issue warrants upon the gossamers of suspicion and conjecture.

I would reverse.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 78-1437.

UNITED STATES OF AMERICA,
APPELLEE,

v.

JAMES FRANCIS MELVIN.
DEFENDANT, APPELLANT.

Judgment

Entered April 13, 1979.

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

/s/ DANA H. GALLUP,
Clerk.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 78-1437.

UNITED STATES OF AMERICA,
APPELLEE,

v.

JAMES FRANCIS MELVIN.
DEFENDANT, APPELLANT.

Before Coffin, *Chief Judge*,
Campbell and Bownes, *Circuit Judges*.

Memorandum and Order.

Entered: May 4, 1979.

Appellant's petition for rehearing is based on his disagreement with the court's legal analysis and his understandable disappointment in the result. This is a close case, susceptible of different analysis by different minds as the dissenting opinion of our able colleague indicates. The petition adds nothing, however, to the arguments already presented and considered.

Accordingly it is denied. Our colleague, Judge Bownes, would allow the petition.

Petition denied.

By the court:

/s/ DANA H. GALLUP,
Clerk.